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—Macfadden Acquisition Corp.

Aeronautical Service

Memorandum Opinion and Order adopted terminating proceeding to investigate the extent and nature of interference-related compatibility problems between the major broadcasting services and the VHF Aeronautical Mobile Radio Services. Action was taken in view of comments filed in response to the *Notice of Proposed Rulemaking, 50 FR 19392,* May 2, 1985. Those comments did not provide enough substantive information from which final rules could be adopted. In addition, the Commission feels that final action would be premature until after the International Radio Consultative Committee (CCIR) meets in late 1986.

—B/cing and VHF Aeronautical Services
MM Docket No. 85-108

Amateur Operator

Notice of Proposed Rule Making adopted regarding the expansion of privileges available to novice operators. Action taken is largely in response to petition by the American Radio Relay League, Inc. (ARRL) and reflects the Commission's hope that an enhanced Novice license will benefit the Amateur Radio Service.

-Amateur Radio Service
PR Docket No. 86-161

Amateur Radio Service

(See: Amateur Operator-*Amateur Radio Service*)

Application, Denial

Petition for Reconsideration of Commission's *Order*, FCC 85-234, adopted April 30, 1985. Commission had already considered and rejected all arguments presented in proceeding. Applicant has failed to make sufficient showing required by Section 73.1125(a)(3).

—Forus FM B/cing N.Y. Inc.

Cable TV

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—Cable TV Hardware
CC Docket No. 86-212

Candor, Lack of

Review Board reverses *I.D.* and denies renewal application for Station WBBY(FM), 103.9 mHz, Westerville, Ohio. Applicant made willful, repeated, intentional misrepresentations, lacked candor, and seriously violated rule Sec. 1.65, during the comparative phase of the case, with regard to the changed employment circumstances of its 24% owner/proposed station manager. Separate statement suggests that Commission replace non-renewal and revocation remedies by compulsory divestiture.
—*Mid-Ohio Communications, Inc.*
MM Docket No. 82-282

CATV Carriage, Must Carry Signals

Petitions for partial reconsideration of *Report and Order, 50 FR 18637*, that amended its rules to implement certain provisions of the Cable Communications Policy Act of 1984 denied. Comments filed in response to Commission *Order Reopening the Period for Filing Comments* in this docket, *50 FR 38016*, accepted. Commission also adopts a revised definition of basic cable service that eliminates references to must carry rules.
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MM Docket No. 84-1296

Channel Assignment

Fourth Report and Order adopted amending Part 73 of the Commission's rules regarding the FM Table of Allotments, with the termination of a related proceeding involving co-channel and adjacent channel upgrades, action was taken to resolve the remaining counterproposals to make new FM allotments to various communities as proposed in the Further Notice of Proposed Rulemaking, *50 FR 2835*, January 22, 1985.
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Comparative Criteria

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Diversification of Control of Mass Media

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—Caldwell Broadcasting Corp.
BC Docket No. 82-453

Divestiture
Orders requiring telephone company to divest affiliated cable TV systems because of violations of cross-ownership rules and to pay forfeiture for willful and repeated violations of Rule 63.64 and Section 214 of Communications Act temporarily stayed in part.
—Comark Cable Fund III

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—Detariffing of Customer Premises Equipment
CC Docket No. 81-893

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Orders requiring telephone company to divest affiliated cable TV systems because of violations of cross-ownership rules and to pay forfeiture for willful and repeated violations of Rule 63.64 and Section 214 of Communications Act temporarily stayed in part.
—Comark Cable Fund III

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—SMR Systems
PR Docket No. 86-160

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Information, Request for

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—*Chester Associates*

MM Docket No. 84-525

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(See: Aeronautical Service-*B/cing and VHF Aeronautical Service*)

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—*Riverside B/cing Co., Inc.*

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Order adopted amending a procedural rule set forth in the *Second Report and Order, 50 FR 5983*, February 13, 1985, concerning frequency allocation to various services. Action was taken to provide the Commission with sufficient time to attend to the administrative details required to include settlement entities in the lottery system.

—*Multipoint Distribution Service*

Gen Docket No. 80-112

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(See: Lottery-*Multipoint Distribution Service*)

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—*Archilla-Marcocci Spanish Radio Co.*

MM Docket No. 84-49

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(See also: Information, Request for-*Chester Associates*)

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—*Radiodetermination Satellite Service*
Gen Docket No. 84-689

Second Report and Order adopted amending Part 25 of the Commission's rules with respect to the Radiodetermination Satellite Service. Specific action was taken in response to comments filed in the notice of proposed rulemaking pertaining to licensing policies and procedures.
—*Satellite Communications*
Gen Docket No. 84-689

Reconsideration, Petition for, Denial of
(See: CATV Carriage, Must Carry Signal-*Amendments of Parts 1, 63, and 76*)

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Rule Making, Notice of Proposed
(See: Amateur Operator-*Amateur Radio Service*)

(See also: Frequency, Use of-*Local Area Networks*)

(See also: Frequency Assignment, Non-Broadcast-*SMR Systems*)

(See also, Cable TV-*Cable TV Hardware*)

Rules, Amendment of
(See: Channel Assignment *FM Broadcast Assignments*)

(See also: Radiodetermination Service-*Satellite Communications*)

Satellite Communications, Procurement
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—*Satellite Communications*

Service First Local
(See: Need for Service, See Service-*Archilla-Marcocci Spanish Radio Co.*)

Service Need for
(See: Need for Service, See Service-*Archilla-Marcocci Spanish Radio Co.*)

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(See: Channel Assignment-*FM Broadcast Assignments*)

Tariff
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—*MTS/WAT Market Structure*
CC Docket No. 78-72

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(See: Aeronautical Service-*B/cing and VHF Aeronautical Services*)

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(See: Need for Service, See Service-*Archilla-Marcocci Spanish Radio Co.*)

Amateur Operator
Amateur Radio Service
Rule Making, Notice of Proposed

Notice of Proposed Rule Making adopted regarding the expansion of privileges available to novice operators. Action taken is largely in response to petition by the American Radio Relay League, Inc. (ARRL) and reflects the Commission's hope that an enhanced Novice license will benefit the Amateur Radio Service.
—*Amateur Radio Service*
PR Docket No. 86-161

FCC 86-192

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	PR Docket No. 86-161
Amendment of the Amateur Radio Service Rules to Expand the Privileges Available to Novice Operators.	RM-5022 RM-5038 RM-5023 RM-5251 RM-5024 RM-5281 RM-5025 RM-5282

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1986; Released: April 30, 1986

BY THE COMMISSION:

1. Notice of Proposed Rule Making in the above-captioned matter is hereby given.

2. Larry W. Garens, Brady, Texas, has filed five petitions for amendment of the Amateur rules. Their object is the expansion of operating privileges for Novice operators. Petition RM-5022 proposes to allow Novice and Technician[1] operators the use of telegraphy and radioteleprinter privileges in the 10-meter band;

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[1] Since the Technician class license includes all the privileges of the Novice class, any enhancement of Novice class privileges would also benefit the Technician class.

RM-5023 proposes to allow telephony privileges in the 10-meter band; RM-5024 requests radiotelegraphy on 30 meters; and RM-5025 proposes telegraphy and telephony in the 1.25-meter band. These petitions were filed on February 27, 1985. Mr. Garens filed another petition on November 29, 1985 (RM-5251) requesting Novice privileges in a small segment of the 902-928 MHz band. In this frequency band, he proposes telegraphy, telephony, radioteleprinter, packet radio and ASCII digital communications. Both in RM-5022 and RM-5251, Mr. Garens says he is looking for persons with computers to enter the Amateur Radio Service and use their radios and computers together.

3. On June 6, 1985, the American Radio Relay League, Inc. (ARRL) filed a petition for rule making (RM-5038) to enhance the operating privileges of Novice operators. The ARRL seeks to provide greater motivation for amateurs-to-be to obtain their first license, without reducing the incentive to upgrade by attaching too many privileges to what is, and should continue to be, an elementary license. It proposes to allow Novices telephony and data privileges sufficient to permit communication with other local amateurs and to provide an occasional opportunity for long-distance communications. The essential elements of the ARRL's proposal are:

(a) Authorize Novice control operators digital communication privileges in the 10 meter band on frequencies 28.1-28.3 MHz;

(b) Authorize Novice control operators emission J3E telephony privileges in the 10 meter band on frequencies 28.3-28.5 MHz;

(c) Authorize Novice control operators frequency privileges in the entire 1.25 meter band with all emission privileges authorized for that band and with a transmitter power limit of 25 watts. Stations in repeater operation could retransmit the signals from Novice stations, but no Novice licensee could be the control operator or the station licensee of a station in repeater operation;

(d) Authorize Novice control operators frequency privileges in the 0.23 meter band on frequencies 1246-1260 MHz with a transmitter power of 5 watts similar to the conditions proposed for the 1.25 meter band.

4. The ARRL requests that Section 97.67 (d) be amended to allow Novice operators 200 watts PEP power on the proposed expanded 10-meter Novice subband; 25 watts at 220-225 MHz; and 5 watts at 1246-1260 MHz. It also requests that other operators who are now authorized to operate at higher power

levels in these three subbands be permitted to continue to operate there with those higher powers.[2]

5. The ARRL also requests that the Element 2 examination syllabus be expanded to include topics about digital communications and telephony techniques. According to the ARRL:

> This is necessary in order that the examination content be commensurate with the privileges granted by the license class. In this connection, it would be proper to expand the Novice written examination to thirty questions and the question pool (PR Bulletin 1035A) to 300, to accommodate additional questions on operational aspects of the additional privileges available to Novice licensees.

In replying to comments to its petition, the ARRL elaborated:

> It is not the League's intention by this suggestion that the examination be made more difficult, as that would discourage newcomers to amateur radio—the antithesis of the League's proposal. Rather, the goal is to increase the comprehensiveness of the examination without increasing the difficulty thereof. Merely expanding the Novice class examination question pool to 300 to accommodate questions on the *operational* aspects of the additional privileges should create no deterrent to prospective entrants to the Novice ranks. It *will*, however, insure that at least the use of the new privileges are understood by the newcomer, and that his or her on-the-air operating practices are well disciplined and orderly from the outset.

6. The ARRL also seeks to preserve the integrity of the Novice examination. To this end, the ARRL requests that Section 97.28 be amended to require that each examination for the Novice class operator license be administered by two volunteer examiners holding General class licenses or above, rather than the presently required one examiner.

7. Richard E. Darwicki also seeks enhancement of the Novice operator privileges in RM-5282. He proposes to add new privileges in the 160-meter band, and expand privileges in the 40-meter and 80-meter bands for Novice and Technician operators. Mr. Darwicki says that his proposal is designed to increase the possibility of obtaining training in emergency traffic handling and promoting higher technical skills, including telegraphy proficiency.

8. Albert D'Errico, Jr., and others, many of whom are affiliated with the Six Meter International Radio Klub (SMIRK), propose additional Novice privileges for the 6-meter band (RM-5281).

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[2] The ARRL would retain the present 200 watts PEP power limit for all licensees in the three existing Novice subbands below 28 MHz. At present, the 200 watt power limitation for all licensees also applies in the subband 28100-28200 kHz. Under this proposal, that limitation would be removed for other than Novice and Technician operators. We are especially interested in hearing from Novice licensees on this issue.

They propose to add telegraphy, upper sideband and amplitude modulation emissions to the 6-meter band for Novice operation, with a maximum authorized power of 15 watts. SMIRK suggests a frequency subband of 200 kHz between 50.3 and 50.5 MHz.

9. The comments received were, in the main, directed to the proposals contained in RM-5038. The greatest concern was with the proposal to allow Novices single sideband telephony emission on 10-meters. Commenters believe that this would pave the way for the 10-meter band to become undisciplined radio operation. They also fear that Novices will buy ready-made equipment and not get into the technical aspects of amateur radio. Some commenters suggest instead that double sideband amplitude modulation be permitted. This would give Novices the opportunity to use either home-constructed equipment or minimally-modified CB equipment, both options being cost-effective, and technically relatively simple.

10. Another concern is that once the Novice operator is authorized telephony privileges, the incentive to upgrade would diminish or become non-existent. Also argued is that Novices are "entry level" operators and, therefore, inexperienced. One commenter stated that such operators would cause second harmonic interference to TV channel 2 and to other radio services, if they are given privileges at 28.3–28.5 MHz.

11. The comments also suggest that, if enhanced privileges are granted Novices, the Novice license should be made non-renewable (or be changed from 10 years to 5 years and then made non-renewable) in order to force Novices to upgrade. Making the Novice license a part of the volunteer examination system (with or without a fee) to preclude cheating was also suggested. A commenter also opposed the ARRL's proposal to "grandfather" existing Novice licensees for the enhanced privileges, without reexamination.

12. One commenter said that it would be a mistake to take "entry level" licensees and give them the privilege of digital communications, especially on an international frequency band such as the 10-meter band. That commenter noted, as did others, that Novice privileges between 28.3–28.5 MHz would interfere with international beacons. The proposal to allow Novice privileges at 1246–1260 MHz was also questioned. One commenter objected on the basis that operation in that band requires technical skill at the suggested lower power of 5 watts, and that "entry level" operators should not be exposed to the radiation there. Opening the 220 MHz band to Novices was opposed on the

ground that repeater operation in that band needs to be protected from amateurs who are not allowed to be control operators or licensees of stations in repeater operation.

13. Support for the various proposals reflects a concern that something must be done to attract a new generation to amateur radio. Mr. David C. Andrus captures this idea rather succinctly:

> I feel that the single most important thing that the ARRL's proposal for enhancement of the Novice license will do is to encourage many young people who are presently involved in computers at home and school to consider the expansion of their "reach" with radio-linked telecommunications.

The same theme is sounded by other commenters, but with the caveat that bringing new people into amateur radio should be done carefully and not with a "quick-fix" approach.

14. Our statistics show a decline in both the number of new Novice operators and of total Novice operators. There are 10,000 fewer Novices now than there were two years ago.[3] The ARRL blames the decline on limited operating privileges of Novices. Of the four amateur bands now authorized for operation, the ARRL states that propagation conditions are so poor in the current phase of the sunspot cycle that, except for local communications, operation is largely limited to the 80-meter and 40-meter bands. According to the ARRL, even in these two bands, Novices are frustrated and inhibited because of Canadian amateur telephony operations in the 80-meter band and international broadcast activity in the 40-meter band. The ARRL reasons that persons at the beginner level must be allowed enhanced opportunities if they are to pursue greater operating privileges in amateur radio.

15. One of the fundamental purposes of amateur radio is to maintain a pool of operators, technicians and electronics experts. In light of the apparent downward trends in Novice operators, we are concerned that a valuable national resource is being diminished. Accordingly, we will propose rule making, largely along the lines proposed by ARRL, in the hope that an enhanced Novice

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[3] The following table shows the attrition rate for Novices.

	FY 83	*FY 84*	*FY 85*
New Novices	18,744	17,392	15,913
Upgraded	10,274	8,829	10,422
Dropped out	9,129	14,883	9,615
Novices at year end	86,781	80,461	76,337

license will benefit the service and reverse the trends.[4] It must be recognized that there are currently two petitions for rule making pending before the Commission, RM-4829 and RM-4831, seeking accommodation for narrowband land mobile operations in the 216-225 MHz band. Additionally, in General Docket 80-739 the Commission decided to maintain the fixed, mobile and amateur services as co-primary allocations until the FCC/National Telecommunications and Information Administration working group develops an appropriate allocation plan for this band.[5] In view of this, we will not finalize the matter of permitting novice amateurs in the 220-225 MHz band until these petitions are resolved.

16. We invite particular discussion of the ARRL's request for two examiners to administer Novice examinations should the privileges of this license be enhanced. Integrity of the license is important, but we are not convinced that two examiners is the right safeguard to employ. Including Novices in the Volunteer Examination System has merit, but we are reluctant to disturb the present procedure under which aspirants to amateur radio receive their licenses quickly and free of charge. Moreover, we are unsure of the capacity of the Volunteer Examination System to handle this volume of applicants. Commenters should also have due regard for the need to minimize changes to FCC forms.

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which

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[4] We inquire whether the trends discussed above may not be a result of the limited privileges of the Novice class license, but may instead reflect an imbalance in the privileges and qualifications associated with the present license classes. If so, we ask for comment whether the following adjustment would be helpful. The Technician operator written test requirements could be confined to those topics from Element 3 commensurate with the VHF and UHF privileges authorized by the license. It would be a simple matter to rearrange the topics into two syllabi: Element 3(A) for VHF and UHF; Element 3(B) for MF and HF. Element 3(A) would be a written test requirement for a Technician-and-above license. Element 3(B) would be a written test requirement for a General-and-above license.

[5] See paragraphs 30 and 31, Second Report and Order in General Docket 80-739, adopted November 8, 1983, Implementation of the 1979 WARC, FCC 83-511; 49 FR 2357, January 19, 1984.

addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation, addressing matters not fully covered in any previously-filed comments in the proceeding, must prepare a written summary of that presentation; on the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 CFR 1.1231. A summary of the Commission's procedures governing *ex parte* contacts in informal rule makings is available from the Commission's Consumer Assistance Office, FCC, Washington, D.C. 20554, (202) 632-7000.

18. Authority for issuance of this Notice is contained in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(c) and (r). Pursuant to applicable procedures set forth in Section 1.415, 47 CFR 1.415, of the Commission's Rules, interested persons may file comments on or before July 16, 1986, and reply comments on or before August 20, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided further that the fact of the Commission's reliance on such information is noted in the Report and Order.

19. In accordance with Section 1.419 of the Commission's Rules, 47 CFR 1.419, formal participants must file an original and five copies of their comments and other materials. Participants who wish each Commissioner to have a personal copy of their comments should file an original and eleven copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Each set of comments must state on its face the proceeding to which it relates (PR Docket Number) and should be submitted to: The Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours in

the Commission's Public Reference Room at its headquarters in Washington, D.C.

20. Pursuant to 5 U.S.C. 603, we submit this initial regulatory flexibility analysis. We propose to enhance the Amateur Novice class operator license by allowing Novice licensees greater operating privileges. These privileges are proposed for portions of the 28, 220 and 1200 MHz bands and will include telephony which is not presently permitted for Novices. Appropriate power levels are also proposed. Our authority to promulgate such rules derives from Sections 4 (i) and 303 (c) and (r) of the Communications Act of 1934, as amended. The new rules are expected to increase interest among all persons in becoming amateur radio operators. We estimate that at least 20,00 persons each year will become Novices. It is possible that some of these new applicants will purchase single sideband telephony radio equipment. Thus, there is expected to be some effect on the sale of amateur radio equipment, including antennas, towers, transmission lines, transceivers, microphones, connectors and filters. No additional record keeping requirements are being imposed. We cannot currently determine with any specificity the increase in equipment sales, if any, that small entities may experience. We will examine this proceeding's effect on small entities further in the Final Regulatory Flexibility Analysis in this proceeding.

21. Insofar as they are consistent with the proposed rules adopted herein, rule making petitions RM-5022, 5023, 5024, 5025, 5038, 5251, 5281 and 5282 ARE GRANTED, and in all other respects ARE DENIED.

22. IT IS ORDERED, That the Secretary shall cause a copy of this Notice to be served upon the Chief Counsel for Advocacy of the Small Business Administration and the Secretary shall also cause a summary of this Notice to be published in the Federal Register.

23. For information concerning this proceeding, contact Maurice J. DePont, Federal Communications Commission, Private Radio Bureau, Washington, D.C. 20554, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations would be amended as follows:

1. **The authority citation for part 97 would continue to read as follows:**

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C 151-155, 301-609, unless otherwise noted.

2. **Section 97.7 (a) would be revised, as follows. The line entry for the 10-meter band would be revised to read as shown below. Following the kilohertz listing, a megahertz listing for the 1.25 and 0.23-meter bands would be added.**

§ 97.7 Frequency privileges.

* * * * *

(a) *Novice class*:

Meter band	*Terrestrial location of the amateur radio station* ITU Region 1	ITU Region 2	ITU Region 3	Limitations (see para.(g))
		kilohertz		
*	*	*	*	*
10	28100-28500	28100-28500	28100-28500	1
		megahertz		
1.25	–	220-225	–	1, 3, 4, 5, 32
0.23	1246-1260	1246-1260	1246-1260	1, 5, 11, 32
*	*	*	*	*

3. In Section 97.7 (b), the line entry for the 10-meter band would be revised to read:

§ 97.7 Frequency privileges.

* * * * *

(b) ***

Meter band	*Terrestrial location of the amateur radio station* ITU Region 1	ITU Region 2	ITU Region 3	Limitations (see para.(g))
*		*		*
10	28100-28500	28100-28500	28100-28500	1
*	*	*	*	*

4. Section 97.7 (g) (1) would be revised to read, as follows:

97.7 Frequency privileges.

* * * * *

(g) *Limitations*:

(i) Novice and Technician class control operators are limited to the use of international Morse code when the station is transmitting emission A1A on frequencies 3700-3750 kHz, 7100-7150 kHz (7050-7075 kHz when the terrestrial station location is within Region 1 or 3), 21100-21200 kHz and 28100-28500 kHz.

* * * * *

5. Section 97.61 (a) would be revised by adding a new line entry before 28000-28300, by removing limitation 1 from the line entry for 28000-28300 kHz and by adding a new limitation 3 in the line entry for 28300-29700 kHz, as follows:

§ 97.61 Authorized emissions.

(a) *kilohertz*:

Frequency Band (kHz)	Emissions	Limitations (see para.(d))
*	* *	* *
2800-29700	A1A	
2800-28300	A1A, F1B	
28300-29700	A1A, A3E F3E, G3E, A3C, F3E, G3E, A3C, F3C, A3F, F3F, H3E, J3E, R3E	
*	* *	* *

6. Section 97.61 (d) would be revised to add a new limitation (3), as follows:

§ 97.61 Authorized emissions.

* * * * *

(d) * * *

(1) * * *

(2) * * *

(3) Novice and Technician class control operators may not use emissions A3E, F3E, G3E, A3C, F3C, A3F, F3F, H3E or R3E when operating in the frequency band 28300-28500 kHz.

7. Section 97.67 is revised by removing subparagraph (6) of paragraph (d), and by adding new paragraphs (j) and (k), as follows:

§ 97.67 Maximum transmitting power.

* * * * *

(j) The transmitter power of each amateur station at which the control operator holds only Novice or Technician class operator privileges shall not exceed 200 watts peak envelope power when transmitting in the 10-meter band.

(k) The transmitter power of each amateur station at which the control

operator holds only Novice class operator privileges shall not exceed 25 watts peak envelope power when transmitting in the 1.25-meter MHz band, and 5 watts peak envelope power when transmitting in the 0.23-meter band.

8. Section 97.85 would be revised by adding a new paragraph (i).

§ 97.85 Repeater operation.

* * * * *

(i) No amateur station at which the control operator or station licensee holds only Novice class privileges shall be in repeater operation.

9. Section 97.86 would be revised by adding a new paragraph (e).

§ 97.86 Auxiliary operation.

* * * * *

(e) No amateur station at which the control operator or station licensee holds only Novice class privileges shall be in auxiliary operation.

10. Section 97.87 would be revised by adding a new paragraph (f).

§ 97.87 Beacon operation.

* * * * *

(f) No amateur station at which the control operator or station licensee holds only Novice class privileges shall be in beacon operation.

CATV Carriage, Must Carry Signals
Reconsideration, Petition for, Denial of

Petition for partial reconsideration of *Report and Order, 50 FR 18637*, that amended its rules to implement certain provisions of the Cable Communications Policy Act of 1984 denied. Comments filed in response to Commission *Order Reopening the Period for Filing Comments* in this docket, *50 FR 38016*, accepted. Commission also adopts a revised definition of basic cable service that eliminates references to must carry rules.
—Amendment of Parts 1, 63, and 76
MM Docket No. 84-1296

FCC 86-277

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984	MM Docket No. 84-1296

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: May 30, 1986; Released: June 5, 1986

BY THE COMMISSION

Introduction

1. On April 11, 1985, the Commission adopted a *Report and Order* in MM Docket No. 84-1296, (*Report and Order*), 50 FR 18637, that amended its rules to implement certain provisions of the Cable Communications Policy Act of 1984 (Cable Act). Before the Commission are three Petitions for Partial Reconsideration of the *Report and Order*. These petitions seek reconsideration of the Commission's policy decisions in two areas: 1) franchise fees; and

2) the definition of "cable system." Also before the Commission are comments filed in response to its *Order Reopening the Period for Filing Comments* in MM Docket No. 84-1296 (*Order*), 50 FR 38016. This *Order* was issued to provide interested parties an opportunity to comment on the impact of the U.S. Court of Appeals decision in *Qunicy Cable TV, Inc. v. FCC* (*Qunicy*) on the definition of "basic cable service" adopted in the *Report and Order*.[1]

2. By this *Memorandum Opinion and Order*, we are denying the Petitions for Partial Reconsideration of the *Report and Order*. We are also adopting a revised definition of "basic cable service" that eliminates references to the must carry rules.

Discussion

3. On October 30, 1984, the Cable Communications Policy Act of 1984 was signed into law.[2] This legislation amends the Communications Act of 1934 by adding a new Title VI, entitled "Cable Communications." The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.[3] In the *Report and Order*, the Commission amended its rules in order to comply with several provisions of the Cable Act.

4. Petitions for Partial Reconsideration were filed by Miami Cablevision (Miami CATV), the National Association of Broadcasters (NAB), and the Association of Maximum Service Telecasters (MST). Miami CATV seeks reconsideration of the Commission's decision to delete the franchise fee standards from the rules and its related refusal to reinstate petitions concerning franchise fee disputes that were pending prior to the effective date of the Cable Act. The NAB and MST each request that the Commission revise the definition of a "cable system" adopted in the *Report and Order*. As indicated in the *Order*, we also believe it necessary to consider modifications to the definition of "basic cable service" adopted in the *Report and Order* to reflect the

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[1] In the *Quincy* decision, the Court ruled that the Commission's mandatory signal carriage ("must carry") rules for cable television systems are invalid under the Constitution of the United States. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

[2] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 1 *et seq.*, 98 Stat. 2779 (1984).

[3] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (hereinafter House Report).

Qunicy decision. These issues will be addressed in turn.

5. *Franchise Fees*. Section 622 of the Cable Act specifies that the franchise fees paid by the cable operator to the franchising authority shall be no more than five percent of gross revenue. In addition, Section 622(i) provides that "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."

6. In the *Report and Order*, the Commission concluded that these statutory provisions rendered Section 76.31 of its rules concerning franchise fee limits invalid. On this basis, the Commission deleted Section 76.31.[4] The Commission held that Section 622 of the Cable Act "spells out quite clearly the terms of the franchise fee and how it is to be administered" and that, therefore, "there is no need for us to further define this matter." The Commission further stated that it believed any disputes involving franchise fee matters are best resolved through the courts. In concert with this decision, the Commission declined to reinstate petitions concerning franchise fee disputes under Section 76.31 of its rules that were pending prior to December 29, 1984, the effective date of the Cable Act. The Commission indicated that it no longer had a regulatory interest in resolving petitions involving policy matters that were rendered moot by the Cable Act.

7. Miami CATV requests that the Commission amend, rather than delete, its rules regarding franchise fee standards. In this respect, Miami CATV asks the Commission to adopt rules that provide for interpretation of various aspects associated with franchise fees that are raised in the Cable Act. More specifically, Miami CATV requests that the rules address subjects that include: 1) determinations of whether certain kinds of payments are franchise fees within the meaning of Section 622 (g)(1); 2) whether a given fee exceeds five percent; 3) what type of "tax, fee, or assessment" is "unduly discriminatory" against cable operators per Section 622(g)(2)(C); 4) with respect to new fran-

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[4] Section 76.31 of the Commission's rules formerly limited franchise fees to three percent of a cable system's gross revenues, with provision for obtaining a five percent fee upon submission to the Commission of a showing of reasonableness. This rule also contained suggested, but not mandatory, guidelines for the local franchising process. The Commission found that these provisions were generally addressed by Section 621 and other sections of the Cable Act. The Commission also deleted Section 76.30 of its rules which provided that the franchise fee limits in Section 76.31 were applicable only to cable systems with more than 1000 subscribers.

chises, whether or to what extent are capital costs exempt from inclusion as part of the franchise fee; 5) with respect to new franchises, whether or to what extent are various payments exempt from inclusion as part of the franchise fee; and 6) the retroactive application of various provisions of the Cable Act. It also requests that the Commission reinstate the petitions regarding franchise fee disputes that were pending prior to December 29, 1984. The National Cable Television Association, Inc. (NCTA) filed comments in support of Miami CATV's petition for reconsideration. The National League of Cities (NLC), the City of Miami (Miami), and New York City (NYC) filed in opposition.

8. In its petition, Miami CATV argues that by not promulgating amendatory replacement provisions for our franchise fee rules, the Commission has abdicated its statutory authority and contravened the letter of Section 622 of the Cable Act and the intent of Congress. It argues that since the Cable Act is remedial in nature, the Commission is required to take a liberal interpretation of its provisions. Miami CATV further contends that "in not recognizing the possibility of a legitimate need for initial supervision of the many aspects of franchise fees not precluded by Section 622(i), the Commission has ignored its responsibility regarding the Section 622(i) exception." Thus, Miami CATV asserts, the Commission has rendered functionless the phrase "except as provided in this section" and, therefore, has violated a cardinal rule of statutory construction, i.e., that a legislature is presumed to have used no superfluous words. Miami CATV also states that implementation of Section 622 is mandatory, not permissive. This is so, it argues, because the underlying congressional intent requires that the permissive word "may" in Section 622(i) be construed as mandatory.[5] Finally, Miami CATV claims that to render moot petitions pending under prior law is to impermissibly adopt a general retroactive application of the Cable Act's franchise fee provisions.[6]

9. NCTA supports Miami CATV's position that the Commission should amend, rather than delete, its franchise fee rules. It argues, by way of comparison, that the Commission adopted rules to ensure that the lockbox provisions of Section 624 of the Cable Act are carried out even though that section did not specifically

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[5] Section 622(i) of he Cable Act provides that "[a]ny Federal agency may not regulate the amount of the franchise fee paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."

[6] At the time it filed its reconsideration petition, Miami CATV was seeking a ruling from the Commission concerning franchise fees relating to its system in Miami, Florida. It subsequently withdrew that petition.

require the Commission to play a role in its implementation or enforcement. NCTA notes that the Commission went so far as to adopt special relief provisions for disputes arising out of Section 624, yet it left disputes arising from Section 622 to be resolved by the courts. NCTA states that if these matters are left to the courts, there are likely to be disparate and inconsistent rulings which would frustrate the congressional intent to provide the industry with the certainty and stability it needs.

10. In opposition, NLC contends that the legislative history does not provide support for Miami CATV's interpretation of the applicability of the Section 622(i) exception. It submits that the requirement for a liberal interpretation of a statute that Miami CATV cites is applicable primarily in cases in which broad regulatory programs have been deemed essential for the public welfare. NLC contends that Miami CATV has made no showing that a regulatory program for franchise fees is essential for the public welfare. NLC and NYC point out that Section 622 does not include provisions which authorize the regulation of franchise fees. They state that, in fact, Section 622 clearly contemplates enforcement of its provisions by the courts. In this respect, NLC and NYC observe that Section 622(d) allocates the burden of proof in court actions involving the pass through of increases in franchise fees to subscribers.

11. Regarding reinstatement of prior petitions involving franchise fees, Miami contends that there is no justification for continuing to apply any of the Commission's past policies that would be inconsistent with the standards of the Cable Act. Miami further argues that to apply such past policies at this late date would contravene the Cable Act's fundamental objective of establishing clear standards to govern the relationships between franchising authorities and cable operators.

12. We are not persuaded that our decision to eliminate the franchise fee provisions from our rules should be modified. The provisions of Section 622 of the Cable Act supersede our franchise fee rules and, as we noted in the *Report and Order*, the House Report states that "[t]he current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the term of this legislation." Additionally, the Cable Act in Section 621, General Franchise Requirements, and Section 626, Renewal, provide standards for the local franchising process. Thus, the Cable Act has displaced Section 76.31 of our

rules and replaced it with specific statutory provisions.

13. Turning to the question of continued jurisdiction over those franchise fee issues not covered by former Section 76.31 of our rules, we believe that Congress intended and anticipated that enforcement of the franchise fee provisions and adjudication of disputes thereunder would be administered in substantial part, through the jurisdiction of the courts. The FCC continues to have jurisdiction in this area. Section 1 of the Communications Act provides that the Commission shall "execute and enforce the provisions of [the] Act." This mandate must, however, be read in conjunction with the more specific provisions of the Act and with due regard for the divisions of responsibility for enforcement and interpretation that Congress specified in both the specific words of those amendments to the Act adopted in the Cable Act and in the legislative history of those amendments. That authority was divided, sometimes explicitly and sometimes implicitly, between the Commission, the U.S. Department of Justice, the federal courts, the state courts, the states, and the municipal franchising authorities. Issues relating to cable franchise fees had been regulated by Commission rule prior to the adoption of the Cable Act with considerable resulting controversy.

14. The course of the legislative process suggests to us that Congress intended through the Cable Act to both resolve the basic substantive issue of the permissible fee level and withdraw this matter from controversy before the Commission. Although the allocation of responsibility under this Section is not as specific as might ideally be desired, it does reference court actions under its particular subsections. (*See* Section 622(d)). This reference is in sharp contrast to other provisions of the Cable Act, where the Commission's primary and often exclusive role in adjunction and enforcement are delineated. These include access grievances (47 U.S.C. § 532(e)); cross-ownership questions (id., §§ 533(b), (c)); rate regulation (id., § 543(b), (h)); and equal employment opportunity (id., § 554).

15. Limiting our exercise of jurisdiction in this manner also comports with the legislative history to Section 622: S.2172 (97th Congress), a predecessor bill to the one finally adopted, provided the Commission with explicit authority and responsibility for the regulation of franchise fees. In testimony before the Senate Subcommittee on Communications on April 26, 1982, the Chairman of the FCC noted that there was a rulemaking proceeding in progress before the Commission in which deletion of the existing rule was being proposed and urged "if there is a Congressional

desire to continue rules in this area, the legislation should retain its present explicit grant of authority to the Commission." The legislation finally passed, however, contained no such explicit authority. Indeed, the House Report (p. 65) states: "Subsection 622(i) prohibits any agency of the United States, including the FCC, from regulating the amount of the franchise fee or the use to which the funds collected through the fee will be put. The current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the terms of this legislation.

16. Given the location of the fee limit in the Communications Act and our perception that Congress intended disputes over fees be judicially resolved, it appears to us that such jurisdiction as may remain in the agency was to be exercised at best concurrently with the judiciary. It is our opinion that judicial decision making in this area is both superior and preferred. This is, for example, the manner in which existing Section 605 of the Act has historically been enforced. We believe that the comparison NCTA makes to the Commission's decision to adjudicate disputes arising over the lockbox requirements of Section 624 is inappropriate. In this respect, we observe that there is no reference in this section explicitly giving the courts jurisdiction to enforce the lockbox requirements. In addition, Section 624 specifically contemplates that the Commission may find it necessary to establish technical standards relating to facilities and equipment required by the franchising authority pursuant to a franchise agreement.

17. Miami CATV, in urging continued Commission adjudicatory responsibility, quotes from the Committee cost estimate in the House Report indicating that a portion of the one million dollar cost to the FCC of implementing the Cable Act is attributable to the FCC's "continuing responsibilities . . . including enforcement of . . . franchise fee limits." House Report, p. 38. As noted below, the FCC will continue to entertain certain fee disputes that bear directly on our expertise in telecommunications, a very limited range of cases we believe. In further considering this point, we note that the Congressional Budget Office estimate that accompanies the Committee cost estimate and provides more detailed discussion of the Commission's continuing responsibilities does not mention administrative, adjudicative, or any other form activity with respect to franchise fees. We believe that the House Report's reference to franchise fees is illustrative of the types of expenditure which we might incur rather than a substantive

determination of the breadth of the FCC's role over fees.

18. Accordingly, given our recognition of the concurrent judicial and FCC jurisdiction over disputes involving Section 622, we will continue to entertain disputes only involving matters that directly impinge on a "national policy concerning cable communications" (47 U.S.C. § 541(1)) that call upon our expertise and we direct parties to resort to courts to decide all other matters. Guidance in this area can be drawn from subsection (g) of Section 622, which indicates the range of definitional disputes that may arise under the definition of franchise fee. Thus, disputes involving whether a particular levy by a state is an impermissible franchise fee disguised as a tax (see 47 U.S.C. §§ 542(g)(1), (2)(A)), payments made under the Copyright Act (id., § 542(g)(2)(E)), incidental payments made under terms of the franchise (id., § 542(g)(2)(D)) or challenges to the constitutionality of a particular fee will be directed to courts, whose jurisdiction is established by the Act.

19. On the other hand, the Commission will entertain fee disputes concerning matters that arise directly under specific provisions of the Cable Act and that may call upon the expertise of the Commission for their interpretation. For example, we will entertain interpretations of the Cable Act involving whether costs incurred in connection with public, educational or governmental access facilties (id., § 542(g)(2)(C)-(D)) should count toward the statutory five percent fee limit. However, we recognize that concurrent jurisdiction would apply, and the particular facts of any given dispute might indicate that local courts would be the more suitable forum.

20. We find that this division of authority, in addition to comporting with the legislative history of the Act, also will serve the goals of administrative convenience and economy.[7] First, many of the matters that may arise under disputes involving Section 622 will call for evidentiary showings that involve testimony from individuals or the production of exhibits that are located in the franchise community. These considerations make local courts the most convenient forum except when particular Commission expertise is called into play.

21. Second, disputes that are likely to arise may not be resolved by simply making mathematical calculations to determine whether the statutory fee cap has been exceeded or through

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[7] Disputes concerning franchise fees have been brought to the Commission in the form of declaratory ruling petitions. The Administrative Procedure Act, 5 U.S.C. § 554(e) specifically grants administrative agencies authority to act on such requests within their "sound discretion."

the application of any FCC expertise related to telecommunications regulation. The bulk of the fee disputes resolved by the FCC in the past related to whether a franchisor could gain the additional two percent above the previous three percent limit. These disputes involved whether the additional costs were cable-related. This type of FCC scrutiny is now forbidden to the FCC by the terms of the statute and the accompanying history. Those disputes that did not call for resolving the three percent limit questions involved matters that called for interpreting contract provisions and matters of local taxation. Federal involvement in local tax matters, as we have noted, is "among the most delicate arising out of a federal system," *Cable Television User Tax*, 50 FCC 2d 540, 543 (1974). We are therefore reluctant to exercise jurisdiction in areas where we possess no expertise and where the relevance of the dispute to a "national policy concerning cable communications" is slight. Disputes over particular contract terms fall into the same category.

22. Caution by federal authorities over local tax questions has been recognized elsewhere. The Tax Injunction Act, 28 U.S.C. § 1341, forbids federal courts to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." It has been suggested, as an argument for continued Commission involvement, that this Act might preclude resolution of cable franchise fee disputes in federal court and that a federal limit on cable fees ought not be left under the control of states. First, some fee disputes will not involve issues covered by the Tax Injunction Act; the jurisdiction of federal courts will thus be available. Further, the tax Injunction Act is specifically directed to taxes rather than fees. To the extent it is applicable to cable fees directly or by analogy, however, we believe this argument proves too much. It would be anomalous for Congress to preclude federal court involvement to preserve the authority of the state decision making machinery while simultaneously providing federal administrative agency authority over the same subject matter.

23. Third, beyond tax and contract dispute questions, we foresee that another area of dispute under Section 622 may relate to the constitutionality of particular fees. Such cases are generally associated with attempts to levy specific taxes or fees on media. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 757 (1983); *Erie Telecomms. v. City of Erie*, Cir. Act. No 85-185 (W.D. Pa). These matters are the special province of the judicial branch of government, not an agency

whose expertise is in the field of telecommuncations regulation.

24. Turning to those disputed fees arising prior to the Cable Act, we conclude that we should follow the same principles for exercising jurisdictional authority. In particular, we believe it wise to allow courts that decide the "tax or fee" status of state and local levies to decide the status of those levies regardless of whether they arose before or after the effective date of the Act. Restricting jurisdiction over these matters allows parties to obtain consistent treatment of identical fee disputes. Further, this consistent treatment for such disputes is supported by the legislative history of the Act. In the Senate's consideration of the law, an official "legislative history" was included in the Congressional Record (October 11, 1984 at S.14285) that includes the following:

> Any franchise in effect on the effect (sic) date of Title VI that provides for a franchise fee in an amount up to or in excess of the five percent limitation in section 622(b) (*with or without the need for action by any Federal agency*) shall be deemed to have lawfully required such fee, up to but not in excess of five percent . . . (emphasis added)

Congressman Dingell in the House, one of the principal legislators involved in the drafting and passage of the Act, also addressed the consequences of the legislation for fees in excess of the Commission's previous limit. He states, concerning fees that violated the Commission rules, that "Any franchise which contemplated franchise fees up to or in excess of 5 percent shall be deemed to have lawfully required this fee, but not in excess of 5 percent." He goes on to state that:

> In cases where franchise fee payments have been discontinued on the basis of FCC rules, the franchise authority is entitled to the discontinued payments. In all cases regarding payment of fees prior to the effective date of this bill, it is the original intent of the parties to the franchise agreement concerning franchise fees that should prevail.

Congressional Record of October 11, 1985 at H. 12241.

These statements indicate that the Commission was not supposed to continue to attempt to achieve compliance with the rules it had adopted prior to the Cable Act after the Cable Act was adopted. Fees at least up to the limit specified in the Cable Act were to be permitted regardless of previous actions or rules of the Commission. Accordingly, we believe Congress's interest in having the FCC resolve past fee disputes was lessened, not strengthened, by the passage of the Act. Given our reasons for declining to decide fee dispute cases not involving clearly delineated telecommunications matters prospectively, we see no reason to adopt a different policy for pre-Act disputes which involve essentially the same questions posed by the post-Act disputes. In particular, we decline to reinstate the petitions that were pending prior to December 29, 1984. We have paid particular attention to whether, under the guidelines set forth for determining when our involvement in resolving franchise fee disputes would seem helpful, we should change our position in regard to the two pre-December 29, 1984, petitions which are the subject of pending judicial review. *See Yakima Valley Cablevision, Inc. et. al, v. FCC*, D.C. Cir. Nos. 85-1464 and 85-1665. In our view, neither of those petitions, which were filed by Yakima Valley Cablevision and the Connecticut Cable Television Association, respectively, involve the type of questions where our expertise can usefully be brought to bear. We therefore adhere to our dismissal of those petitions.

25. *Cable System Definition.* Section 602(6) of the Cable Act defines a "cable system" as:

> " ... a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community ... "

This section also specifically excludes from the definition of a cable system, *inter alia*: 1) facilities that only retransmit the signals of broadcast television stations; and 2) facilities that only serve subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facilities use public rights-of-way.

26. In the *Report and Order*, the Commission adopted the definition of a cable system specified in the Cable Act to replace the definition in Section 76.5(a) of its rules. The Commission recognized that there were differences in the new definition and that formerly specified in the rules. In particular, the former rule defined cable system as a facility that distributes the signals of broadcast stations, whereas the new definition specifically excludes facilities that only retransmit broadcast signals. A second difference is that the former definition excluded systems with fewer than 50 subscribers. Finally, the former definition in the rules excluded all facilities serving multiple unit dwellings under common ownership, control or management. The new definition of a cable system includes such facilities if, and only if, they use public rights-of-way. When multiple unit dwellings are involved,

the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management.[8]

27. The Commission recognized that as a result of these definitional differences, many facilities that previously qualified as cable systems would no longer come under the new definition. These facilities, therefore, would no longer be subject to Federal policies such as must carry requirements and eligibility for cable antenna relay service (CARS) facilities licenses that apply to cable systems.[9] To alleviate the disruptive effects of this change, the Commission ruled that facilities subject to the must carry rules at the time of the *Report and Order* would continue to be subject to the must carry rules. The Commission also grandfathered CARS license eligibility for existing licensees of such stations.

28. NAB requests that the Commission amend its rules to provide that the implementation of the Cable Act does not affect the applicability of the must carry rules.[10] The NAB is concerned that the new definition has modified the applicability of the must carry rules in three respects: 1) cable systems that would otherwise choose not to carry any broadcast signals are now subject to the must carry rules; 2) cable facilities that only retransmit broadcast signals are now exempt from these rules; and, 3) cable facilities with less than 50 subscribers that were previously exempt are now subject to must carry requirements. It submits that Congress intended that the applicability of the must carry rules be unaffected by the implementation of the Cable Act. NAB states that this intent is expressed in Section 624(f)(2) of the Cable Act[11], and that the House Report emphasizes this intent by singling out and naming the must carry rules among those to remain unaffected by the new statute.[12]

29. MST expresses concerns similar to those of NAB. However, MST addresses only the issue that the new definition makes the must carry rules applicable to all cable facilities. It requests that

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[8] *See Report and Order* at para. 27.

[9] Under the expanded definition of a cable operator as discussed in paragraph nine of the *Report and Order* and incorporated in Section 76.5(ee)(2) of our rules, anyone who controls or is responsible for the management and operation of a cable system would also be eligible for a CARS license upon a proper showing of such management or operational authority.

[10] NAB suggests that this can be accomplished by adding a note to the must carry rules to indicate that these rules shall also apply to all facilities defined previously as cable systems on or before the date the *Report and Order* was adopted.

[11] *See* Cable Act, § 624(f)(2).

[12] *See* House Report, p. 70.

the definition of cable system be modified to make it clear that must carry requirements apply only to those systems that choose to carry at least one broadcast signal. It argues that the change in the applicability of the must carry rules was made without adequate notice and that such a policy determination was beyond the scope of this proceeding. MST also argues that the Cable Act specifically grandfathers the must carry rules. It further contends that the Commission's action on this issue has unexplored policy ramifications and possibly First Amendment and copyright implications.

30. Since the adoption of the *Report and Order* and the filing of the requests for reconsideration by NAB and MST, two major events affecting the must carry rules have occured. As indicated above, on July 19, 1985, the Court ruled the must carry rules constitutionally invalid in the *Quincy* decision. Hence, the Court vacated the must carry rules. Then, on November 14, 1985, the Commission adopted a combined *Notice of Inquiry and Notice of Proposed Rulemaking (Notice)* to request comments and proposals concerning mandatory signal carriage rules for cable systems in light of the *Quincy* decision.[13]

31. In view of these developments, we find that the issues with respect to the applicability of our former must carry rules raised by NAB and MST in their requests for reconsideration cannot be resolved here. Accordingly, we are denying the Petitions for Reconsideration filed by NAB and MST. However, to the extent that issues raised in these petitions may be relevant to any new rules that may be crafted by the Commission, they will be addressed in the context of the new proceeding on mandatory carriage of broadcast television signals by cable systems.

32. *Basic Cable Service.* Section 623 of the Cable Act requires that the Commission establish standards for the regulation of basic cable service rates by a franchising authority. The House Report encouraged the Commission to "fashion a definition of basic cable services most appropriate to achieve the purpose of the regulations."[14] With this mandate in mind, the Commission

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[13] *See Notice of Inquiry and Notice of Proposed Rule Making* in MM Docket No. 85-349, 50 FR 48232 (1985).

[14] *See* House Report at 66. Section 602(2) of the Cable Act defines basic cable service as "any service tier which includes the transmission of local television broadcast signals." However, that defintion, as the House Report indicates, was intended for use in determining the extent of regulation permitted during the transition period set forth in Section 623(c).

determined that, for rate regulation purposes:

> Basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must carry broadcast television signals as defined in §§ 76.55 to 76.61 of the rules, [or, in the absence of at least three must carry signals, any unaltered broadcast television signals] and the public, educational and governmental channels, if required by a franchising authority under Section 611 of the Communications Act.[15]

33. On September 10, 1985, the Commission issued an *Order* reopening the proceeding in MM Docket No. 84-1296, to provide parties opportunity to comment on the impact of the *Quincy* decision to the definition of basic cable service adopted in the *Report and Order*. Thirteen parties filed comments in response to the *Order.*[16]

34. Many of the parties submitting comments state that only a technical change in the definition of basic cable service is necessary to accomodate the *Quincy* decision.[17] These parties agree that the reference to the must carry rules should be deleted, but differ regarding its replacement. NCTA, for example, states that the reference to the must carry rules should be revised to reflect that they are former rules. This could be accomplished, NCTA states, by replacing the must carry reference in the definition with the phrase "local broadcast television signals" and defining local signals as those signals that were entitled to mandatory carriage as of April 11, 1985.[18] Similarly, the National Telecommunications and Information Administration (NTIA) states that the Commission does not have to refer to the must carry rules in order to define basic cable service. It recommends, however, that basic cable service should be defined as the tier of cable service which includes the retransmission of any unaltered broadcast signal, meaning the signal as transmitted by the

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[15] *See Report and Order* para. 118.

[16] A number of parties commented on the appropriateness of the "effective competition" standard adopted in the *Report and Order*. (*See* the comments of the NLC, NYC, the National Association of State Cable Agencies, and the Satellite Television Industry Association, Inc.) We believe that the Commission's determination of the effective competition standard is unaffected by the *Quincy* decision. Inasmuch as the *Order* specifically requested that comments be limited to the definition of basic cable service, the Commission declines to respond to these comments.

[17] The NLC and NYC repeat their original position thay the Commission has no authority to alter, for rate regulation purposes, the definition of basic cable service as contained in Section 602(2) of the Cable Act.

[18] The State of New Jersey, Board of Public Utilities, Office of Cable Television; Heritage Communications, Inc.; and Centel Cable Television support this position.

broadcaster in its community of license.[19] American Television and Communications Corporation states that basic cable service should be defined as the lowest priced tier of service which includes transmission of all channels required under applicable law to be carried on the cable system. Finally, comments filed on behalf of cable operators by the law firm of Cole, Raywid and Braverman state that basic service should be defined as the tier of service regularly provided to all subscribers.

35. Several parties argue that the invalidation of the must carry rules necessitate a more fundamental change in the definition of basic service to maintain the *status quo* that prevailed after the adoption of the rules implementing the Cable Act. In this regard, the Cable Television Access Coalition, Inc. states that the *Quincy* decision eliminates all requirements for cable operators to provide local broadcast channels in any configuration or at any level of service. Similarly, NYC states that it is concerned that since there are no longer any must carry signals, the current definition of basic cable service as the tier of service which contains "all" such signals invites evasion of the regulatory scheme contemplated by the Cable Act. NYC argues that by deleting any signal that would have been subject to Sections 76.55 to 76.61 of the rules, a cable operator could remove even its lowest service tier from the Commission's present definition of basic cable service. As a possible solution to this problem, NCTA suggests that the definition of basic cable service be modified to permit franchising authorities to require rate regulated systems to co-locate any former must carry signals that the system carries on the lowest priced tier made available to all subscribers.

36. After reviewing the record, we believe that the *Quincy* decision creates only a minor technical problem with the definition of basic cable service. We believe that the invalidation of the must carry rules does not limit our ability to define basic cable service. We also conclude that the *Quincy* decision does not otherwise affect our original policy determination with respect to the definition of basic cable service. The reference to the must carry rules provided a simple reference to a group of broadcast signals carried by cable systems. These same signals can also be referenced by the characteristics that qualified them for must carry status. We believe that to do so would make no policy change in the definition of basic service. In this regard, we note that the definition of basic service required that these signals be

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[19] The Community Antenna Television Association generally supports this position.

configured on a single tier. Thus, we do not agree with commenters who foresee instances of regulatory evasion developing. Accordingly, we are revising the definition of basic cable service contained in the *Report and Order* to eliminate the reference to the must carry rules and include new provisions that specify those signals that were previously afforded must carry status. The amendments for this modification are presented in the Appendix.

37. *Other Matters.* There are a few additional matters in the *Report and Order* that, while not specifically raised in any of the petitions, need some further clarification. In footnote 74 of the *Report and Order*, translator stations are to be included in the determination of signal availability for effective competition if they are "located" in the cable community. While translators are licensed to serve a community, they may in fact, because of topography, be located outside the town limits. It was our intention to count all such translators in the effective competition standard. We are making an appropriate change in the rules to reflect this clarification.

38. Additionally, in footnote 74 of the *Report and Order*, the discussion concerning the use of "significantly viewed in the cable community" as a criterion for determining whether a cable system faces effective competition addresses over-the-air availability of a signal in the cable community. The determination of whether or not a signal is significantly viewed in the cable community is based on Section 76.33 of our rules, which also references the provisions of Section 76.54 of the rules. Consequently, significantly viewed under Section 76.33 is defined in most cases in country-wide terms, although Section 76.54(b) permits the establishment of significantly viewed status on a cable system or community basis.[20]

Procedural Matters

39. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), it is certified that the final rule does not have a significant economic impact on a substantial number of small

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[20] It should be noted that since the *Report and Order*, the Commission has set forth the procedures for demonstrating, in a waiver context, that a signal is no longer significantly viewed. *See* KCST, Inc., FCC 86-50 (released January 27, 1986). Paragraph 11 of this decision can be utilized by parties to show that a station is no longer significantly viewed in a community for effective competition purposes. In this connection, we are making an appropriate change in the rules to clarify the procedures parties may follow when filing petitions regarding the effective competition standard.

entities because no substantive changes have been made to the signal carriage rules.

40. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified forms, information collection and/or recordkeeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours on the public.

41. Accordingly, IT IS ORDERED that the petitions for Partial Reconsideration of the Commission's *Report and Order* in MM docket No. 84-1296 filed by Miami Cablevision, the Association of Maximum Service Telecasters and the National Association of Broadcasters ARE DENIED. In addition, IT IS ORDERED that Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the Appendix, effective July 14, 1986. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 76.5 is amended by revising paragraph (ii) to read as follows:

§ 76.5 Definitions

* * * * *

(ii) *Basic cable service.* For the purposes of regulating the rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition, basic cable service is the tier of service regularly provided to all subscribers that includes the public, educational and governmental channels, if required by a franchising authority under Title VI of the Communications Act, and the retransmission of any broadcast television signals in the following categories:

(1) For communities located outside all major and smaller television markets (as defined in this section):

(i) television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(ii) television translator stations with 100 watts or higher power serving the community of the community unit and for community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;

(iii) noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(iv) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(2) For communities in smaller television markets (as defined in this section):

(i) television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(ii) noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(iii) commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(iv) television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.-Plattsburgh, N.Y., television market);

(v) television translator stations with 100 watts or higher power serving the community of the community unit and, for community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;

(vi) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(3) For communities in major television markets (as defined in this section) and in communities located both wholly or partially within both major and smaller television markets:

(i) television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(ii) noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(iii) television translator stations with 100 watts or higher power serving the community of the community unit and, for those community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;

(iv) television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(v) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(4) In the absence of at least three signals in one of the above categories, any unaltered broadcast television signals.

3. 47 CFR 76.33 is amended by revising paragraph (a)(2) and adding paragraph (e) to read as follows:

76.33 Standards for rate regulation

* * * * *

(a)(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to have effective competition whenever at least three unduplicated signals serve the cable community. Signals shall be counted if they place a Grade B contour (as defined in § 76.33 of our rules) over any portion of the cable community, are significantly viewed within the cable community (as defined by § 76.54 of our rules) or are translator stations licensed to serve the cable community, provided that the translators are not used to retransmit stations already providing Grade B contour or significantly viewed signals within the cable community. The Commission may grant exceptions to this standard where the franchising authority demonstrates with engineering studies in accordance with § 73.686 of the Commission's rules and other showings that such signals are not in fact available within the community.

* * * * *

(e) Any party may petition the Commission for relief of the provisions in this section in accordance with the provisions and procedures set forth in Section 76.7 for petitions for special relief.

* * * * *

Need for Service, See Service
Service First Local
Service Need for
Transmission First Local

Where an application to bring first local transmission service to Annandale was mutually exclusive with applications to serve three rural communities, the Commission awarded dispositive Section 307(b) preferences for proposals to bring first local transmission service to the three smaller communities.

—*Archilla-Marcocci Spanish Radio Co.*
MM Docket No. 84-49

FCC 86-271

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ARCHILLA-MARCOCCI SPANISH RADIO COMPANY Annandale, Virginia	MM DOCKET NO. 84-49 File No. BP-830121AD
Martha Hahn and Philip Y. Hahn Purcellville, Virginia	MM DOCKET NO. 84-50 File No. BP-830121AF
Vernon H. Baker d/b/a RURAL RADIO SERVICE Earlysville, Virginia	MM DOCKET NO. 84-51 File No. BP-830121AG
Edward A. Baker d/b/a BAYSHORE COMMUNICATIONS Denton, Maryland	MM DOCKET NO. 84-52 File No. BP-830121AI
For Construction Permit	

ORDER

Adopted: May 22, 1986; Released: May 30, 1986

BY THE COMMISSION:

1. The above-captioned applications for Purcellville, Virginia; Earlysville, Virginia; and Denton, Maryland are mutually exclusive with the application for Annandale, Virginia. In a Decision (FCC 85R-63, 101 FCC 2d 522, released August 2, 1985) the Review Board reversed the Initial Decision of Administrative Law Judge Edward J. Kuhlman (FCC 85D-8, 101 FCC 2d 532, released January 30, 1985); granted the applications for new standard broadcast stations in Purcellville, Earlysville and Denton filed by Martha Hahn and Philip Y. Hahn, by Rural Radio Service and by Bayshore Communications, respectively; and denied the application for a station in Annandale filed by Archilla-Marcocci Spanish Radio Company. Now before the Commission are: (a) an Application for Review, filed September 3, 1985, by Archilla-Marcocci Spanish Radio Company (Archilla); and (b) an Oposition, filed September 18, 1985, by Martha Hahn and Philip Y. Hahn, Rural Radio Service and Bayshore Communications (Competing Applicants).

2. Having examined the contentions of the parties, we agree with the Board's result in this case. Like the Board, we find that the purposes of Section 307(b) would be better implemented by granting the proposals to serve Purcellville, Earlysville and Denton than by granting Archilla's proposal to serve Annandale. None of the aforementioned communities currently receives local transmission service. Thus, the grant of the Purcellville, Earlysville and Denton proposals permits us to provide local outlets to three separate communities that are located in two different states.[1] In addition, the Earlysville applicant will bring a third daytime service to 400 people, a fourth service to 3,640 people, and a fifth service to 2,505 people. On the other hand, the grant of Archilla's proposal, which does not encompass any underserved areas,[2] would provide local transmission serv-

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[1] Section 307(b) of the Communications Act requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power *among the several States and communities* as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (emphasis added).

[2] When an area already receives 5 or more services, no preference is warranted under Section 307(b) for reception service. *Resort Broadcasting Co.*, 41 FCC 2d 640, 643 (Rev. Bd. 1973); *Caldwell Broadcasting Corp.*, 100 FCC 2d 116, 119 (Rev. Bd. 1985).

ice to only the community of Annandale.

3. Annandale's population exceeds the combined populations of Purcellville, Earlysville and Denton.[3] Although the most populous community is presumed to have the greatest need for local transmission service,[4] Archilla's proposal to serve Annandale does not merit a Section 307(b) preference under the circumstances of this case. We have never before had to make a three-versus-one community choice under Section 307(b). In those cases where we were faced with a choice of granting *two* stations or only one station, however, we chose to make a grant of the two stations that could operate simultaneously.[5] Nevertheless, as Archilla notes, the combined population of the prevailing communities was greater than that of the losing community. To the extent that those cases suggest that population size is the controlling factor in choosing between a grant to a single community and a grant to more than one community, they are hereby overruled.[6] It is our view that the aggregate number of local outlets that can be granted simultaneously, the need of each community for a new transmission service and for a new reception service, as well as the respective sizes of the communities, must be considered in making such a choice. Here only the Earlysville proposal offers any gains in terms of reception area service and these are insufficient to warrant a dispositive Section 307(b) preference.[7]

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[3] The 1980 population was 49,524. The 1980 population of Purcellville, Virginia was 1,564. Depending upon the definition of Earlysville, Virginia, estimates of its population range from 280 to 2,800. The 1981 population of Denton, Maryland was 2,304.

[4] *See e.g., Affinity Communications, Inc.*, 96 FCC 2d 685, 686–87 (Rev. Bd. 1984), *review denied*, FCC 84-625, released July 5, 1984.

[5] *Magnolia Broadcasting Co.*, 12 FCC 14 (1947); *Leonard A. Versluis*, 12 FCC 342 (1947); *George A. Ralston and Jerry C. Miller, et al.*, 12 FCC 784 (1948).

[6] A careful reading of these cases reflects that our selection was also based on the consideration that we could make grants to two communities or to only one, the efficiency of each proposal and the need of each community for a local outlet. *See Ralston, supra*, 12 FCC at 792, where "[w]e recognize[d] that a comparison of total populations to be served should not be controlling in determining the efficient allocation of this local frequency because so large a part of the Oak Park service would be rendered to persons residing in the Chicago metropolitan district outside the village of Oak Park." *Compare Magnolia, supra*, 12 FCC at 21, where we indicated that we would not have made grants to Magnolia and Ruston instead of to Hope and Ruston even if this had been technically possible, since "a fewer number of persons would receive their first primary service by grants to Magnolia and Ruston rather than to Ruston and Hope .... [and because] ... a grant to Magnolia and Ruston would provide service to 11,660 fewer persons daytime and only 524 more persons at night than would a grant to Ruston and Hope."

[7] *See* note 2, *supra*. *See also Kaldor Communications, Inc.*, 98 FCC 2d 292, 294–95 (Rev. Bd. 1984), where a moderate Section 307(b) preference was awarded for a proposal to bring a fourth nighttime service to 6,644 people and

With regard to local transmission service, we are faced with a choice of making grants to three (not two) separate communities located in two different states or making a grant to Annandale alone. While Annandale's population exceeds the combined population of Purcellville, Earlysville and Denton, it is located within the Washington metropolitan area and has relatively less significance to its surrounding areas[8] than the smaller communities have.[9] Under these circumstances, we find that Annandale's presumption of greater need for a local outlet has been sufficiently rebutted,[10] and that a simultaneous grant of the Purcellville, Earlysville and Denton proposals would result in a more equitable and efficient distribution of radio facilities under Section 307(b) than would a grant of the Annandale proposal alone.

4. ACCORDINGLY, IT IS ORDERED That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules that the Application for Review filed September 3, 1985, by Archilla-Marcocci

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a fifth such service to 10,971 people.

[8] We do not mean to suggest that Annandale is not a community for Section 307(b) purposes. Apart from the threshold questions of community status, however, a community's civic, religious, cultural and commercial attributes are also relevant in assessing its need for the proposed facility. *See Ruarch Associates*, 99 FCC 2d 338, 341 (Rev. Bd. 1984), *review denied*, 101 FCC 2d 1358 (1985). *See also Radio Haddonfield, Inc.*, 37 FCC 168, 181 (Rev. Bd. 1964), where a smaller community prevailed on transmission service because of its greater importance to the surrounding areas.

[9] Annandale has a number of local businesses, stores, banks and churches that serve its residents. Although Annandale has its own Chamber of Commerce, it has no local government and relies upon Fairfax County for police and fire protection and educational facilities. (I.D., paras. 8, 11, 13–14). By contrast, Denton is the county seat of Caroline County and serves as an important center of county government and health services. It is governed by five elected commissioners, and provides its own sewage, water and trash collection services. (I.D. paras. 22–23). Purcellville likewise has its own local government, consisting of a seven member town council, headed by a mayor. It has volunteer fire and rescue facilities, a four person police department, and operates its own water system (I.D. para. 16–17). The community of Earlysville has a volunteer fire department as well as a number of churches and civic organizations. (I.D., para. 21).

[10] We agree with Archilla that Annandale's location in a well-served area is not relevant under the transmission aspect of Section 307(b). There has been no showing in this case that the plethora of broadcast signals available in Annandale adequately serve its *local* needs and interests, *see Robert J. Reverman*, 78 FCC 2d 1110, 1114 (Rev. Bd. 1980); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 710–13 (Rev. Bd. 1982), and we have been cautioned against making such an assumption. *Harrell v. FCC*, 267 F.2d 629, 631–32 (D.C. Cir. 1959).

Spanish Radio Company[11] IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[11] Archilla submits in its Application for Review that the Board should have remanded this proceeding to the Administrative Law Judge with instructions to make comparative findings. Without deciding whether the ALJ properly deleted the contingent comparative issue in this case, we agree with the Board that the Section 307(b) issue is determinative. Thus, a remand was unnecessary. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360-62 (1955), where the court indicated that, when applicants specify different communities, Section 307(b) requires that we determine which community has the greatest need for the proposed facility before considering the applicants' comparative attributes.

Aeronautical Service
Interference
Termination of Proceeding, See Proceeding

Memorandum Opinion and Order adopted terminating proceeding to investigate the extent and nature of interference-related compatibility problems between the major broadcasting services and the VHF Aeronautical Mobile Radio Services. Action was taken in view of comments filed in response to the *Notice of Proposed Rulemaking, 50 FR 19392*, May 2, 1985. Those comments did not provide enough substantive information from which final rules could be adopted. In addition, the Commission feels that final action would be premature until after the International Radio Consultative Committee (CCIR) meets in late 1986.
—B/cing and VHF Aeronautical Services
MM Docket No. 85-108

FCC 86-162

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Compatibility Between the Broadcasting Services and the VHF Aeronautical Mobile Radio Services	MM Docket No. 85-108

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: April 10, 1986; Released: April 11, 1986

BY THE COMMISSION:

1. In April 1985, the Commission initiated a proceeding to investigate the extent and nature of interference-related compatibility problems between the major broadcasting services (AM, FM, TV, and International Broadcasting) and the VHF aeronautical mobile radio services. This proceeding was in response to an

increasing potential for interference on aeronautical frequencies, due to a number of factors, including growth in the number of stations in the aeronautical and the broadcasting services. The *Notice of Proposed Rule Making* (*Notice*)[1] suggested the establishment of a set of compatibility criteria as a possible solution equitable to both the aeronautical service and the broadcasting service.

2. In response to the *Notice*, the Commission received 7 comments and 5 reply comments.[2] Although the comments raised significant concerns about the aeronautical interference issues, they did not provide enough substantive information from which final rules could be adopted.

3. Further, the International Radio Consultative Committee (CCIR) (specifically, the Joint Interim Working Party (JIWP) 8-10/1 on Compatibility Between FM Broadcasting and Aeronautical Services near 108 MHz) is scheduled to meet in late 1986. We believe that, although a solution to the aeronautical interference dilemma is necessary, final action would be premature until after the international meeting is held. Therefore, we are terminating this proceeding at this time, but are retaining the comments for review in the future. This action should not be viewed as a lessening of Commission interest in this matter.

4. For these reasons, IT IS ORDERED that MM Docket No. 85-108 IS TERMINATED. This action is taken pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934. This action is effective upon adoption, in accordance with Section 553(d) of the Administrative Procedure Act, in that no rulemaking action is being taken at this time.

5. Further information on this proceeding may be obtained by contacting John Wong, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[1] *See Notice of Proposed Rule Making* in MM Docket No. 85-108, FCC 85-182, 50 FR 19392, May 8, 1985 (adopted April 11, 1985).

[2] Comments were received from the National Association of Broadcasters (NAB); National Broadcasting Company, Inc. (NBC); Association of Federal Communications Consulting Engineers (AFCCE); National Radio Broadcasters Association (NRBA); and the Federal Aviation Administration (FAA). Joint comments were filed by the Air Transport Association of America (ATA) and Aeronautical Radio, Inc. (ARINC) and by National Public Radio (NPR) and National Federation of Community Broadcasters (NFCB). Reply comments were submitted jointly by ATA and ARINC and individually by CBS, Inc.; Society of Broadcast Engineers, Inc.; AFCCE; and NAB.

Cable TV
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted regarding amendment of rules and policies governing attachment of cable television hardware to utility poles.
—*Cable TV Hardware*
CC Docket No. 86-212

FCC 86-274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF RULES AND POLICIES GOVERNING THE ATTACHMENT OF CABLE TELEVISION HARDWARE TO UTILITY POLES	CC Docket No. 86-212

NOTICE OF PROPOSED RULEMAKING

Adopted May 29, 1986; Released June 6, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. We are hereby issuing a Notice of Proposed Rulemaking to solicit comments on proposed changes to our rules and policies governing the attachment of cable television hardware to poles owned or controlled by telephone or electric utilities. Congress mandated that the Commission ensure that the rates, terms, and conditions under which cable television operators attach such hardware are just and reasonable (unless the state elects to assert such jurisdiction). 47 U.S.C. § 224. Sections 1.1401 through 1.1415 of the Commission's Rules, 47 C.F.R. §§ 1.1401-1.1415, were promulgated to implement Section 224. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, *First Report and Order*, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979); *Memoran-*

dum Opinion and Order in CC Docket 78-144, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981). Recently the United States Court of Appeals for the District of Columbia Circuit determined in *Alabama Power Company v. FCC*, 773 F.2d 362 (1985) (*Alabama Power*),[1] that the Commission's methodology did not result in the calculation of the maximum just and reasonable rate allowable under the Act and the Commission had not adequately explained its rationale. Accordingly, this Notice of Proposed Rulemaking will offer proposed policy changes and revised rules for comment, pursuant to Sections 1, 4(i), and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), and 403.[2]

A. *Legislative History of Section 224*

2. It has been common practice for cable television operators to lease space on utility poles in order to provide cable television service to a community. This arrangement was unregulated by any federal authority until the late 1970's, when Congress, in response to concern raised by the cable industry, enacted the Pole Attachment Act of 1978, Pub. Law No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224). In Section 224 Congress established a range of just and reasonable pole attachment rates which "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . . ." 47 U.S.C. § 224(d)(1).

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[1] That case was on appeal of a Commission order, Teleprompter Corp. v. Alabama Power Co., FCC 83-500 (released Nov. 3, 1983), which granted in part Alabama Power's application for review of an Order by the Chief, Common Carrier Bureau, Mimeo No. 001808 (released June 29, 1981).

[2] Two weeks after the *Alabama Power* case was decided the United States Court of Appeals for the Eleventh Circuit held that Section 224 is unconstitutional. Florida Power Corp. v. FCC, 772 F.2d 1537 (1985), *appeal pending*. The Commission's request for rehearing en banc was denied. We believe the *Florida Power* case wrongly decided and deem it necessary and appropriate to conduct this rulemaking proceeding notwithstanding that decision. The purpose of this proceeding is primarily to develop rules and policies which will meet the requirements established by the court in *Alabama Power* so that justice will not be delayed in a circumstance where the Commission is the sole arbiter of just and reasonable rates in accordance with the will of Congress. Accordingly, we will not entertain comments herein regarding the *Florida Power* case and expect all interested parties to file statements without regard to positions they may have taken in that proceeding. In the event further changes are necessitated in our regulations by action of the Supreme Court, we will promptly do so.

To determine this just and reasonable pole attachment rate, Congress directed the Commission to "institute an expeditious program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. No. 95-580, 95th Cong., 1st Sess. 21 (1977). To that end, Congress noted that although there may be some difficulty in determining the components of the operating expenses and actual capital costs of the utility, special accounting measures or studies should not be necessary since the majority of the cost and expense items attributable to the utility pole plant are already established and reported to various regulatory bodies and therefore the information is already a matter of public record. *Id.* at 19-20. Congress did not expect the Commission to reexamine the reasonableness of the cost methodology sanctioned by the various regulatory agencies, and it recognized that the Commission would have to "make its best estimate" of some of the less readily identifiable costs. *Id.* at 20.

3. As indicated above, the range of rates set out by Congress permits the Commission leeway to fix the rate somewhere between the incremental costs of the utility and cable's share of the utility's fully allocated costs. Incremental costs consist of those costs which would not be incurred by the utility "but for" the presence of cable attachments. *Id.* at 19. Congress noted that incremental costs might include pre-construction survey costs and engineering, make-ready and change-out costs incurred in preparing the utility pole for cable attachments. *Id.* at 19. However, it expected a pole attachment rate based on incremental costs to be minimal, since most of those costs would have been fully recovered in the make-ready charges already paid by the cable company. *Id.*

4. By contrast, fully allocated costs refer to the operating expenses and capital costs incurred by the utility in owning and maintaining poles regardless of the presence of cable. Operating expenses and capital costs of poles include interest on debt, return on equity (profit), depreciation, taxes, administrative and maintenance expenses. *Id.* at 19-20. In practical terms, Congress intended the Commission to establish a formula by which rates could readily be calculated based on the Commission's best judgment as to how to allocate costs between the utility and the cable operator. *Id.*

5. Based on the statutory language, the Commission established the following formula to determine the cable company's share of the utility's fully allocated costs of owning a pole:

$$\text{Maximum Rate} = \frac{\textit{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Operating Expenses} + \text{Capital costs of Poles}$$

See, e.g., *Continental Cablevision of New Hampshire, Inc. v. Concord Electric Company*, Mimeo No. 5536 (released July 3, 1985); *Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, Mimeo No. 5431 (released June 28, 1985). Although operating expenses and capital costs of poles (also known as "carrying charges") can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of pole investment. 47 C.F.R. § 1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the cost of a bare pole and the carrying charges attributable to the cost of owning a pole. Consequently, the Commission used the following formula to calculate the maximum just and reasonable rate per pole attachment.[3]

$$\text{Maximum Rate} = \frac{\textit{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charges}$$

For the purpose of establishing a just and reasonable rate, the Commission characterized these costs as approximating fully allocated costs, the upper end of the range of rates established by Congress. *Memorandum Opinion and Second Report and Order* in CC Docket No. 78-144, 72 FCC 2d 59, 71 (1979) (*Second Report*).

B. Background of Current Rulemaking

6. In *Alabama Power* the court found that the so-called "maximum" rate established by the Commission does not accurately reflect the maximum rate allowed under the Act. Specifically, it raised questions about the Commission's methodology in calculating the cost of a bare pole as well as the Commission's computations of the administrative and tax expense components of the carrying charges.[4] Although the Commission usually

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[3] The Federal Energy Regulatory Commission (FERC) and FCC accounts and the formulas used for determining the various components of the operating expenses and capital costs of poles are listed in Appendices A and B.

[4] The court also took exception with Commission findings involving lightning arrestors and grounds and the cost of capital component of the carrying charges. However, these were peculiarities of the particular complaint in *Alabama Power* and, therefore, do not need to be considered in this general rulemaking proceeding. That case was unique because both parties had conceded that lightning arrestors and grounds were cable-related. The net cost of a bare pole is calculated from the pole line account (FERC Account 364 or FCC Account 241). Because lightning arrestors and grounds are not included in

includes guys and anchors[5] as part of the cost of a bare pole, it excluded them in *Alabama Power* because, contrary to the normal practice, the cable company was required to supply its own. The exclusion of the cost of guys and anchors, the court said, was in error. However, the court raised, but did not consider, the issue of whether requiring the cable company to provide and install guys and anchors is a cost, borne by the cable company, that should be considered part of the maximum rate described by § 224(d)(1) (*i.e.*, a deduction from the maximum rate). Likewise, it questioned whether the items eliminated from the pole line account (FERC Account 364) to obtain the cost of a bare pole are, in fact, pole related, and, if so, erroneously omitted from the Commission's calculations.

7. As to the carrying charges components, the court questioned the Commission's policy of using only pole-related accounts in the numerator of the fraction to determine the administrative expense component but a denominator that represents a utility's total electric plant investment. According to the court, this fraction yields an artificially low percentage. As for the tax component, the court did not dispute *per se* the Commission's policy in pole attachment cases of using the flow-through method of accounting (*i.e.*, taxes actually paid) and rejecting the normalization method.[6] Rather, it pointed out that since a more recent Commission decision (in a non-pole attachment case) adopted the normalization approach, the unexplained inconsistency could not be upheld.[7] In addition, because the Commission made no attempt to establish the utility's incremental costs (the minimum rate), the court rejected the Commission's argument that, although it may not have set the maximum statutory rate, its order should be upheld since the rate fell within the zone of reasonableness. Therefore, the court judged the validity of the order solely on the basis of whether the Commission achieved its stated goal of setting the

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the pole line account, they are not part of the cost of a bare pole except in unusual circumstances. As to the cost of capital, the court did not question the Commission's general policy of using the most recent authorized intrastate rate of return, but rather the way in which it was implemented in this particular case. We do not propose to change that policy.

[5] Guys are wires attached to the pole to support it. Anchors fasten the guys to the ground or other support.

[6] See paragraph 17, *infra*, for an explanation of taxes paid and normalized taxes.

[7] The United States Court of Appeals for the Fifth Circuit has recently found that a non-normalized tax component is inconsistent with the depreciation component in the Commission's formula and results in the use of inconsistent and arbitrary rate elements. Texas Power and Light Co. v. FCC, No. 84-4818 (5th Cir. Mar. 17, 1986) (*Texas Power*).

maximum statutory rate and found that we failed to set the maximum rate.

II. DISCUSSION AND PROPOSALS

8. In the instant rulemaking we will examine the questions raised by the court since they affect the method traditionally used to determine the operating expenses and capital costs of poles in our maximum rate formula.[8] We will review whether the Commission need only set a rate within the zone established by the statute, rather than the maximum rate possible under the statute. At the same time we will review the procedural rules, especially Section 1.1404(g), 47 C.F.R. § 1.1404(g), to clarify the steps that should be taken and the information that should be submitted by the parties in each complaint proceeding.[9]

A. Cost of a Bare Pole

9. Two issues relating to the calculation of the cost of a bare pole warrant our attention. The *Alabama Power* court raised, but did not resolve, the issue whether the cost a cable company incurs to provide guys and anchors should be considered in setting a maximum rate authorized by the Commission. In addition, it questioned whether we were correctly applying the carrying charges to the cost of a bare pole (*i.e.*, the investment per pole with the non-cable related plant removed).

10. Our policy has been to calculate the net cost of a bare pole by reducing the net pole plant investment by 15 percent to eliminate the investment in crossarms and other hardware not essential to accomodate cable.[10] The result is then divided by the number of poles owned by the utility.

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[8] Pole attachment matters have been held in abeyance pending the outcome of this rulemaking proceeding. However, we have accepted new filings to preserve parties' rights and establish refund dates. Public Notice, Mimeo No. 0399 (released Oct. 21, 1985).

[9] We will not revisit the issues of relative amount of space occupied by CATV facilities as opposed to the total amount of usable space on a pole in this proceeding since these issues were considered at length in a petition for rulemaking previously considered by the Commission. Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556, FCC 84-325 (released July 25, 1984).

[10] *See* Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of W. Virginia, 79 FCC 2d 232, 235 (1980), *aff'd*, 85 FCC 2d 243 (1981).

$$\text{Net Cost of a Bare Pole} = \frac{\text{Gross Pole Investment} - \text{Depreciation Reserve} - 15\%\,(\text{Net Pole Investment})}{\text{Total Number of Poles}}$$

The 15-percent figure is an average based on nationwide experience which we have used resolving complaints in the absence of specific data. *Memorandum Opinion and Order* in CC Docket No. 78–144, 77 FCC 2d 187 (1980). The 15-percent figure is thus a rebuttable presumption to be utilized in the event no party submits more specific evidence. In order to do so successfully, we have required the party proferring evidence to identify and document the investment in each cable-related item, for example, wooden poles, guys, and anchors. *See, e.g., Teleprompter Corp. v. Tampa Electric Co.*, Mimeo No. 1127 (released Dec. 16, 1981); *Warner Amex Cable Communications v. Tampa Electric Co.*, Mimeo No. 001692 (released June 26, 1981).

11. As indicated above, the investment in guys and anchors is usually included in the net cost of a bare pole as a pole-related expense. Indeed, the amount of the investment in guys and anchors is included in a general pole line account and cannot be separately determined from publicly available data. However, electric utilities often maintain continuing property records from which they can determine the investment in the various items which make up the pole line account. In the *Alabama Power* case, the utility submitted from its plant records the amount of its investment in "cross-arms, guys, anchors and other equipment, either not useful in pole attachment or previously paid for or provided separately by the cable operator." Letter from R.B. Hicks to Gardner Gillespie (July 25, 1980), attached to complaint, File No. PA–81–0014. Since the cable company paid for its own guys and anchors, we excluded the utility's investment in guys and anchors in calculating the net cost of a bare pole. The court believed that this was in error and that the costs of the guys and anchors supplied by the utility should be included in the cost of a bare pole even if the cable company supplied some of its own guys and anchors because the guys and anchors are necessary to the maintenance of Alabama Power's poles. However, the court raised the question of whether an offset or credit should be made to the maximum pole attachment rate when the cable company furnishes its own guys and anchors. Therefore, we solicit comments on whether, and if so, how, an offset or credit should be allowed when the cable company provides additional guys and anchors. There are other payments which companies are some-

times required to make for which an offset might be allowed. For example, some utilities levy application fees or charges for inspections of pole plant that benefit the utility, as opposed to ones that are undertaken for the cable company's benefit (*e.g.*, to make the poles ready for cable). Parties filing comments in support of the position that cable companies should receive an offset or credit for expenditures they are required to make in addition to the routine make-ready charges and the annual per pole rate should address the question of how and to what extent the cable company should be recompensed for these other charges.

12. We stress that any proposals on this or other issues raised in this notice of proposed rulemaking should include a simple procedure based on publicly available data whereby the parties can predict the rate that would ultimately be prescribed by the Commission. An important attribute of the Commission's pole attachment program has been that the parties can compute the rate themselves without the necessity of filing a complaint before the Commission. This has facilitated negotiations and settlements among the parties either after complaints have been filed or before the dispute reached the level of a formal complaint since both parties knew what the Commission's determination would be. We expect any revisions to our formula and policies to have the same degree of certainty that would encourage settlements.

13. We now turn to the question of which items should be excluded from the net pole investment. As noted above, it is Commission practice to adjust this figure by 15 percent to eliminate the investment in crossarms and other non-cable related items. Along with our consideration of which items in the account do not reflect the cost of "owning and maintaining poles," we seek comments on whether our 15-percent figure adequately reflects such investment, and if not, what a suitable rebuttable presumption might be. Parties may propose different figures for telephone and electric companies although we are concerned that different figures for different types of utilities may increase the burden on staff and parties without concommitant public interest benefits. As previously stated, we expect to continue to use a methodology which utilizes publicly available data, does not require ratemaking proceedings, and lends itself to an expeditious resolution of disputes. It is our intent to conform to the will of Congress and to avoid protracted proceedings, special studies, or submissions of internal company data to the maximum extent possible.

B. Carrying Charges

14. The carrying charges used in determining the operating expenses and capital costs of the utility in owning and maintaining its poles generally consist of the following components: administration, taxes, cost of capital, depreciation, and maintenance.

1. Administrative Expenses

15. As discussed in paragraph 7 above, the court objected to our method for calculating administrative expenses. In particular, the court took issue with a numerator which contained only cable-related accounts while the denominator reflected total electric plant investment. It suggested that we could properly derive an allocator by dividing total administrative expenses by total electric plant investment if we determined that the percentage of administrative expenses relating to pole investment was roughly the same as the percentage of administrative expenses relating to the overall investment in electric plant. We have held to the belief that the proportion of administrative expenses relating to poles is much smaller than that relating to total plant because poles logically may have less associated overhead than other more complex assets used to provide utility service. Thus, we would prefer to use a ratio of pole-related administrative expenses to total pole plant investment, but neither the FERC Form 1 nor the FCC Form M contains an administrative expense category solely for pole-related expenses. Regrettably, we have been unable to ascertain a publicly available figure for pole-related administrative expenses only. Therefore, we invite comments, accompanied by substantiating evidence, on whether the ratio of administrative expenses to total plant is the same as that of pole-related administrative expenses to pole plant investment. If the parties contend that the ratio is not the same, we invite proposals on how to adjust the ratio of total administrative expenses to total plant investment to arrive at an appropriate figure for the administrative expenses associated with the pole plant.

16. One possible alternative is to distribute administrative expenses among the other operation, maintenance, and depreciation expense categories, thus eliminating a separate category for administrative expenses. For example, for the electric utility, we could combine the total operation, maintenance, and depreciation expenses from Accounts 401, 402 and 403, (lines 4, 5, and 6, column (e), page 115 of FERC Form 1), and from this figure

subtract total administrative expenses (Total Administrative and General Expense, line 167, Column (b), of FERC Form 1).[11] We would then obtain the ratio of total administrative and general expenses to total other expenses (hereafter called the distribution ratio). Using the distribution ratio we would allocate the administrative expenses among the other operation, maintenance, and depreciation expenses relating specifically to the pole plant. We would thus obtain new figures for the maintenance and depreciation components of the carrying charges (the only components which would be affected) which would include their share of the administrative expenses. Our carrying charges figure would no longer include an administration component since the other components would be increased to add in the appropriate amount for administration.[12]

2. Taxes

17. The Commission has consistently used actual taxes paid in calculating the taxes component of the carrying charges in pole attachment cases. The utility industry, however, generally contends that tax normalization (which reflects total tax liability in the year in which such liabilities are incurred) is the proper method. Alabama Power appealed the Commission's stance on this issue. The *Alabama Power* court did not reject *per se* the Commission's adherence to the taxes paid (or flow-through) approach. Instead, the court was concerned that a more recent Commission decision in the *Second Computer Inquiry*,[13] albeit, a non-pole attachment case, adopted a normalized taxes approach in valuing assets transferred out of regulated service. In doing so the Commission rejected a party's contention that normalization results in a permanent tax savings. Accordingly, the court held

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[11] We intend to apply the same methodology we adopt for FERC Form 1 to the FCC Form M. At present, however, there is a pending rulemaking proceeding the outcome of which will affect the uniform system of accounts for Class A and Class B telephone companies and require modification to the FCC Form M. *See* Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules), CC Docket No. 78-196 (releases Jan. 3, 1985). Accordingly, we are not providing a corresponding analysis for telephone companies at this time. We nevertheless invite comment in this proceeding on applying a similar methodology for telephone companies with respect to the FCC Form M.

[12] See Appendix C for an example of the formulas we would use under this method and how they would be applied.

[13] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, 100 FCC 2d 1298, 1323-24 and n.100 (hereafter, "*Second Computer Inquiry*").

that excluding normalized taxes in calculating a utility's maximum pole attachment rate could not be permitted unless the inconsistency between the Commission's *Alabama Power and Second Computer Inquiry* cases is adequately explained.[14]

18. The *Texas Power* court, on the other hand, found that the Commission's failure to allow the use of normalized taxes was arbitrary and capricious. The court summarized Congress' policy regarding normalized taxes as set forth in the Tax Reform Act of 1969[15] and the Economic Recovery Tax Act of 1981[16] and noted that Congress had provided that regulatory commissions could not exclude deferred taxes in setting rates for regulated utilities. It concluded that since the rates of return authorized by the state commission is lower due to accelerated depreciation and deferred taxes, the Commission's tax component, which does not permit the recovery of these deferred taxes, results in an advantage to the cable television companies at the expense of utility ratepayers. The court also found that the tax and depreciation components of the Commission's formula are inconsistent since the tax component assumes that accelerated depreciation has been taken, but the Commission refuses to permit it to be recovered in either component. Moreover, the court concluded that our tax approach is inconsistent with the intent of Congress that the Commission defer to the cost determinations of the utility's state regulatory commission. In the *Texas Power* case the Texas commission permitted the recovery of deferred taxes in ratemaking proceedings.

19. The legislative history of Section 224 makes it clear that it was not the intent of Congress to require the Commission to embark upon a full ratemaking proceeding in each case brought

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[14] The Commission's decision to use taxes paid was based on other considerations. Specifically, although the Commission stated that "certain deferrals and timing differences in tax payments . . . *may* not properly be attributable to the operating expenses and capital costs of poles Congress has directed us to consider," *Television Cable Services, Inc. v. Monongahela Power Co.*, 88 FCC 2d 56, 59 (1981) (emphasis added), the Commission did not make a specific finding on this issue. It did, however, determine that "the actual taxes paid adequately assigns the company's tax expense to the cost of maintaining poles. At the same time, the actual figure avoids the possibility of apportioning to pole attachments taxes which may be deferred for an indefinite time." *Id.* A more important consideration, however, in regard to maintaining our overall pole attachment scheme is to use specific established accounts from the publicly available data such as the FERC Form 1 or FCC Form M, which readily identify taxes actually paid.

[15] Section 441(a), Pub. L. No. 91-172, 83 Stat. 487, 625-28 (codified as amended at 26 U.S.C. § 167(1)).

[16] Pub. L. No. 97-34, 95 Stat. 172 (codified as amended at 26 U.S.C. § 168).

before it. S. Rep., *supra*, at 22. Instead, Congress directed the Commission to establish a simple and expeditious procedure for resolving pole attachment disputes. To date the utilities urging us to adopt a tax normalization approach have proposed various methods in individual complaint proceedings which have relied on internal company records. We recognize that the current trend in ratemaking is to adopt the tax normalization method, and we would prefer to use this approach in resolving pole attachment complaints. Therefore, we solicit proposals on a simple and expeditious method using publicly available data, including specified FERC or FCC account, page, and line numbers. Data which has been accepted by state regulatory commissions and which is publicly available may be considered. Parties should suggest specific methods for determining normalized taxes for both telephone and electric utilities.

C. Minimum Rate Versus Maximum Just and Reasonable Rate

20. In enacting Section 224 of the Act, Congress was aware that the utilities conferred subordinate rights to cable operators in relation to their own use of pole space. The utilities have a virtual monopoly over pole ownership and were accused of abusing their position in negotiating contracts with cable operators. The cable industry had to contend with this situation because in many parts of the country there was no practical economic alternative to using the utilities' poles. S. Rep., *supra*, at 13.

21. Congress' pole attachment legislation was based on the assumption that cable companies utilized "surplus" space on the poles. Therefore, Congress indicated that the level of pole attachment fees "should be set somewhere between avoidable and fully allocated costs. . . ." *Id.* It has been Commission policy to identify only the maximum level. *See, e.g., Texas Cablevision v. Southwestern Electric Power Company*, Mimeo No. 2747 (released Feb. 26, 1985); *Group W Cable, Inc. v. Interstate Power Co.*, Mimeo No. 3118 (released Mar. 27, 1984).

22. As the *Alabama Power* decision pointed out, because our methodology focused exclusively on the maximum rate, we made no effort to establish the minimum statutory rate. If we have not established both the upper and lower level of the statutory range, the court reasoned, a less than maximum rate determined by the Commission's formula may not be supportable if the lower end of the zone of reasonableness is not defined. Under the statutory scheme, which relies on a complaint process, most complaints are

filed by cable companies alleging that a utility is charging in excess of its fully allocated costs. In addition, in those few cases filed by utilities, the utility argues that the rate being charged should be at the maximum level under the statute. Therefore, we have been called on to concentrate on defining the maximum rate. We continue to expect to focus on the upper end of the statutory range since complaints by cable companies claiming that a rate exceeds fully allocated costs will continue to be the norm. Hence, we do not propose to establish the minimum rate in routine cases. By definition, fully allocated costs exceed avoidable costs (*i.e.*, incremental costs). Thus, there is a presumption that the pole attachment rate determined by the formula falls above the utility's incremental costs. If the utility wishes to rebut this presumption, it will have the burden of proving the minimum statutory rate.

23. On the other hand, in light of the court's concerns we propose to formalize through this proceeding the notion that the rate determined by our formula is the maximum rate as defined by 47 U.S.C. § 224. Even though we also recognize that accounting used by utilities permits some flexibility in identifying and recording expenses, we cannot fashion a formula of general applicability that encompasses all situations. Indeed, most utilities do not keep, much less report in publicly available records, the detailed subaccounts which would be necessary to assure a precise maximum rate in every case. Absent a full ratemaking proceeding in each dispute, in which we examine each account and subaccount to select the amount related to the cost of owning and maintaining a pole, it is virtually impossible to include every expense and only those expenses which would lead to the calculation of the exact maximum rate for each particular utility, which we are convinced was not the intent of Congress. Thus, our goal is to adopt a formula which, using publicly available data, meets the concerns of the court and results in a rate which is, for the purpose of fulfilling the intent of Congress, the maximum level within the statutory just and reasonable range.[17] At the same time the components of the formula for computing this rate should be predictable and retain the level of certainty which in the past has yielded a significant volume of negotiated settlements relying on Commission standards. We therefore request

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[17] We do not read Section 224 of the Act to require us to find the absolute maximum rate. As long as our formula provides for a rate within the zone of reasonableness (*see* Section 224(d)(1)), we will have exercised our responsibilities under the statute.

comments on an approach which will achieve these results without the need for complex calculations or excessive reliance on internal company records.

D. Procedural Rules and Information Requirements

24. At this time we will also review our rules to simplify and clarify those procedures that should be followed and the information that should be submitted by the parties in each complaint proceeding. Currently, Section 1.1402(d), 47 C.F.R. § 1.1402(d), defines the term "complaint" as a filing by either a cable television system operator or a utility alleging that a rate, term, or condition for a pole attachment is not just and reasonable; Section 1.1402(e), 47 C.F.R. § 1.1402(e), defines the term "complainant" to mean a cable television system operator or a utility which files a complaint. These definitions have tracked our original expectation ". . . that a complainant in any complaint proceeding should be a signatory or assignee of the agreement by which attachment has been authorized." *First Report and Order*, 68 FCC 2d at 1585, 1591 (1978). To simplify the process for handling pole attachment complaints, however, we propose to expand these definitions to include a cable television association or an association of utilities. We do so for the following reasons. Generally a utility will enter into comparable agreements with a number of cable television operators within the utility's service area, and the issues in contention with that utility usually focus on the same or similar contractual provisions. Through our proposed expansion of the definitions, we envision a reduction in both the number of complaints and the resulting paperwork, which should benefit all of the parties. For example, if one set of data applies to several cable television operators, their association could, on their behalf, request information from the utility and file one joint complaint. Likewise, the utility could supply one set of data to the association instead of responding to numerous cable operator information requests and would have to respond to just one complaint. This would further the goal of "simple and expeditious" resolution of pole attachment complaints.[18]

25. Section 1.1404 of the Rules, 47 C.F.R. § 1.1404, sets forth the information that must be included in a complaint. We propose to eliminate certain requirements. Specifically, Section 1.1404(d)(1) requires a statement that the utility uses or controls poles, ducts

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[18] To the extent that a utility would be ordered to refund overcharges, our ordering clauses would require such payments to the specific cable television operators named in the complaint.

or conduits used or designated for wire communications, which is to be accompanied by evidence of such use or designation, or an explanation why such evidence cannot be provided. Section 1.1404(d)(2) requires a statement that the cable television operator currently has attachments on the poles, which is to be accompanied by evidence of such attachment, or an explanation of why such evidence cannot be provided. Our experience indicates that it is not necessary to submit separate evidence of the use of the poles or of the cable system attachment to the poles. The verified statements of the complainant are sufficient except in unusual circumstances. Thus, under our proposal the complaint must still contain the statements that the utility uses or controls poles used or designated for wire communications and that the cable television system operator has attachments on the poles. However, if evidence of this is required in a particular dispute, we will require the submission of additional data at the time it becomes needed.

26. Additionally, we propose to clarify Sections 1.1404(g)(2) and (4), 47 C.F.R. §§ 1.1404(g)(2) and (4), which require, respectively, that a complaint contain the crossarm investment for poles lines and the depreciation reserve associated with the crossarm investment. We propose to revise the phrase to read: "the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available." This change would recognize that the adjustment for items not related to the cost of owning or maintaining a pole consists of more than crossarms themselves and that many utilities do not keep the detailed subaccounts from which they could supply this information.

27. Section 1.1404(g)(5), 47 C.F.R. § 1.1404(g)(5), requires that the complaint contain the total number of poles owned and controlled by the utility. In determining the cost of a bare pole, the total number of poles must be adjusted if some of the utility's poles are jointly owned with another entity. Therefore, we propose to require that the complaint specify the number of jointly owned poles, if any, and the percentage of each joint pole owned by the subject utility.

28. Under our Rules, the complaint must also contain, *inter alia*, the rate of return figure authorized for the utility for intrastate service in the jurisdiction in which the cable company takes service. 47 C.F.R. § 1.1404(g)(10). This figure is used as the cost of capital component in the carrying charges in computing just and reasonable pole attachment rates. We will continue to employ the most recent authorized intrastate rate of return as the

cost of capital component. However, we propose to require that a utility supply a copy of the state administrative or court decision as an attachment to its response to the complaint if the rate of return is at issue in the proceedings, noting the section of the decision which specifically establishes the authorized rate of return. Since the utility is in the best position to know the most recent decision regarding its rate of return, by furnishing the relevant document itself, it will eliminate the possibility that the Commission might not have the most recent figure in its possession.

29. Generally a cable company which is considering filing a complaint requests certain information from the utility to assess the validity of its belief that the rate is too high. Although most utilities are cooperative in responding to the cable company, a few have failed to provide the requested information in a timely fashion. Therefore, we propose to amend Section 1.1404(h) to emphasize that the utility should supply the information listed in Section 1.1404(g), along with the relevant supporting pages from its FERC Form 1, its FCC Form M, or other public report, within 30 days of the request by the cable operator.[19] Although certain utilities have taken the position that it was not necessary to supply the information because it is publicly available, some of the information, for instance, the total number of poles owned, controlled, or used by an electric utility (*see* Sections 1.1404(g)(5) and (6) of the Rules), is within the sole control of the utility. Moreover, there is often a delay in obtaining the most recent data from publicly available records. As a result, the complaint is often based on older data than that used by the utility in its response. If the utility supplies the actual supporting pages from its report, the determination of the pole attachment rate should be simplified since all of the parties and the Commission will be using the same data and will have the necessary supporting data to resolve any discrepancies. If a complaint is eventually filed, the cable company will be required to submit these supporting pages with its complaint. We expect utilities to provide documents even though

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[19] In unique circumstances, when a utility in apparent good faith is unable to provide the requested information (*see, e.g.*, Capital Cities Cable, Inc. v. Mountain States Telephone and Telegraph Company and Arizona Public Service Company, Mimeo No. 5059 (released June 29, 1984) ("*Capital Cities*")), it should submit documented alternate data and a proposed methodology to utilize the data. If the cable operator rejects this methodology, it should propose an alternate rate based on publicly available data. It is not sufficient merely to allege that a rate is too high. *See* Heritage Communications, Inc. v. Iowa Power and Light Company, Mimeo No. 08383 (released Mar. 30, 1981), *rev. denied*, FCC 81-417 (released Sept. 25, 1981).

a complaint has not yet been filed in order to promote prompt resolution of matters in controversy. In any event, we propose to require that the utility supply this information in its response to the complaint if it did not submit the supporting pages to the cable operator at an earlier time.

30. We also propose to clarify Section 1.1404(i), 47 C.F.R. § 1.1404(i), which provides that the complaint shall include a brief summary of all steps taken to resolve the dispute prior to filing. We have consistently rejected motions to dismiss a complaint on the grounds that the cable operator did not summarize the steps taken to resolve the dispute. It is in the interests of both the utility and the cable company to resolve disputes without resorting to a complaint before the Commission. Our rules were designed to enable the parties to calculate a just and reasonable rate using our guidelines, which will be amended pursuant to this proceeding in a manner to assure that parties have clear guidance on the likely result of a Commission decision. Nevertheless, the Commission's Rules do not require useless negotiations when substantial differences separate the parties. *See, e.g., Capital Cities, supra,* at paras. 4–5. The utility is on notice that a cable company may be contemplating filing a rate complaint when the utility receives an information request. If the utility wants to negotiate, it simply has to offer to do so. *See, e.g., Teleprompter Corporation v. Northern States Power Company*, Mimeo No. 001154, paras. 3 and 4 (released June 1, 1981), *modified on other grounds*, Mimeo No. 2894 (released Mar. 22, 1982). Consequently, we propose to amend Section 1.1404(i) by adding language allowing the complainant to explain that negotiations did not take place because they appeared to be useless under the circumstances.

31. Finally, if the utility argues that the proposed rate is below its incremental costs, it would have the burden of showing that this figure is below the minimum statutory rate. This is appropriate since such information would be uniquely within the utility's control. Accordingly, we propose amending Section 1.1409(b), 47 C.F.R. § 1.1409(b), to reapportion the burden of establishing a prima facie case. Interested parties are encouraged to comment on these proposals and to submit their own proposed procedural rule changes.

III. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

32. *Reason for Action.* The Commission is initiating this rulemaking proceeding because of the need to re-examine our

policies governing cable television attachments to utility poles and to clarify certain rules regarding pole attachment complaints, pursuant to the findings of the U.S. Court of Appeals in *Alabama Power, supra.*

33. *The Objective.* The objective of this notice of proposed rulemaking is to seek public comment on proposed changes to our pole attachment rate formula and rules. The Commission wishes to modify its pole attachment formulas and adopt revised rules which will facilitate the prompt resolution of complaints concerning the rates, terms and conditions of pole attachments.

34. *Legal Basis.* The authority for this proposed rulemaking is contained in Sections 1, 4(i), 224, and 403 of the Communications Act. 47 U.S.C. §§ 151, 154(i), 224, & 403.

35. *Description, potential impact and number of small entities affected.* The proposed changes will have the net effect of not increasing the burden on small cable operators who wish to file complaints nor on small utilities which must respond to the complaints. In keeping with our Congressional mandate, the proposed policy and rule changes will continue to utilize a formula which relies on publicly available data.

36. *Recording, record keeping and other compliance requirements.* No additional recording, or record keeping will be required by the proposals set forth in this proceeding. At present we request electric utilities to supply certain information with their response to the complaint. The proposed rules will request the utility to supply that information to the cable company or the cable association, which, in turn, will include those pages with the complaint. In addition, if the allowed rate of return is at issue, the utility will be required to submit the order from the state regulatory body which sets the rate of return. These changes will affect the timing of submitting material to the Commission, but the material itself is already in the possession of one of the parties and is usually submitted in the course of the pleading cycle in any event. By submitting the data at an earlier stage, the issues to be pleaded should be simplified.

37. *Federal rules which overlap, duplicate or conflict with this rule.* None.

38. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* There are no significant alternatives which would minimize the impact on small entities. The Commission's alternative would be to take no steps to improve the complaint process in response to the concerns raised by the court in *Alabama Power, supra.* This would be

inconsistent with the current Commission objective of providing service to the public in the most efficient, expeditious manner possible.

39. *Comments are solicited.* Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this notice of proposed rulemaking, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

IV. EX PARTE PRESENTATIONS

40. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission Secretary for inclusion in the public files. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comment in the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission's official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* 47 C.F.R. § 1.1231.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 224, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 151, 154(i), 224, and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, that there IS ISSUED A

NOTICE OF PROPOSED RULEMAKING.

42. IT IS FURTHER ORDERED, pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, that all interested persons may file comments on the matters discussed in this *Notice* and the proposed rule changes contained in the attached Appendix D by July 28, 1986, and reply comments by August 12, 1986. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken with respect to the proposals contained herein. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

43. IT IS FURTHER ORDERED that pursuant to Sections 1.51 and 1.419 of the Rules, 47 C.F.R §§ 1.51 & 1.419, an original and five copies of all comments, replies, pleadings, briefs, or other documents shall be filed with the Commission. Copies of all filings will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C. 20554.

44. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau, is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

45. IT IS FURTHER ORDERED that The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. § 601, *et seq.*).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

LOCATIONS IN FERC FORM NO. 1 AND FCC FORM M

ACCOUNT NO.	*NAME*	*LOCATION*
FERC 593	Maintenance of Overhead Lines	p. 322, line 118, col.b
FERC 364	Poles, Towers, & Fixtures	p. 203, line 59, col.g
FERC 365	Overhead Conductors	p. 203, line 60, col.g

FERC 369	Services	p. 203, line 64, col.g
FERC 920	Administrative & General Salaries	p. 322, line 150, col.b
FERC 921	Office Supplies and Expenses	p. 322, line 151, col.b
FERC 922	Admin. Exp. Transferred (Credit)	p. 323, line 159, col.b
FERC 928	Regulatory Commission Expenses	p. 323, line 159, col.b
	Depreciation	p. 200, line 22, col.b
	Taxes Paid	p. 258, line 28, col.e
FCC FORM M 241	Pole Lines Investment	p. 19, Sch.12A, line 11, col.h
FCC FORM M 608	Depreciation Rate for Account 241	p. 31, Sch.14C, line 7, col.d
	Administrative Expenses	p. 61, Sch. 35, Oper. Exp.
FCC FORM M 661	Executive Dept.	line 46
FCC FORM M 662	Accounting Dept.	line 47
FCC FORM M 663	Treasury Dept.	line 48
FCC FORM M 664	Law Dept.	line 49
FCC FORM M 665	Other General Office Salaries and Expenses	line 50
FCC FORM M 668	Insurance	line 52
FCC FORM M 669	Accidents and Insurance	line 53
FCC FORM M 674	General Services & Licenses	line 57
FCC FORM M 677	Expenses Charged Construction	line 60
FCC FORM M 602.1	Repair of Pole Lines	p. 60, Sch. 35. Oper. Exp. line 1
	Depreciation Reserve for Account 241	p. 30, Sch. 14B, Depreciation Reserve Study, line 7
	Gross Plant Investment	p. 19, Sch. 12A, Analysis of Telephone Plant Acc'ts, line 23, col. h

APPENDIX B

CALCULATIONS USING FERC FORM NO. 1 DATA

$$\text{Net Cost of a Bare Pole} = \frac{\overset{\text{A/C 364}}{\text{Gross Pole Investment}} - \text{Depreciation Reserve} - .15\ \text{Net Pole Investment}}{\text{Number of Poles}}$$

$$\text{Depreciation Expense} = \text{Depreciation Rate For Gross Pole Investment} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}}$$

$$\text{Administrative Expense} = \frac{\text{A/C } 920 + \text{A/C } 921 + (-\text{A/C } 922) + 928}{\text{Gross Plant Investment (Electric)* } - \text{ Plant Depreciation Reserve}}$$

$$\text{Maintenance Expense} = \frac{\text{A/C } 593}{\begin{matrix}\text{Investment in} \\ \text{A/Cs } 364 + 365 + 369\end{matrix} \quad \begin{matrix}\text{Depreciation in} \\ \text{A/Cs } 364 + 365 + 369\end{matrix}}$$

$$\begin{matrix}\text{Taxes} \\ \text{(Expressed As} \\ \text{a Percentage} \\ \text{of Net Plant} \\ \text{Investment)}\end{matrix} = \frac{\text{Taxes Paid}}{\text{Gross Plant Investment (Total)* } - \text{ Depreciation Reserve}}$$

CALCULATIONS USING FCC FORM M DATA

$$\text{Net Cost of a Bare Pole} = \frac{\begin{matrix}\text{A/C } 241 \\ \text{Gross Pole} \\ \text{Investment}\end{matrix} - \begin{matrix}\text{Depreciation} \\ \text{Reserve}\end{matrix} - \begin{matrix}.15 \text{ (Net Pole} \\ \text{Investment)}\end{matrix}}{\text{Number of Poles}}$$

$$\text{Depreciation Expense} = \begin{matrix}\text{A/C } 608 \\ \text{Depreciation} \\ \text{Rate for Gross} \\ \text{Pole Investment}\end{matrix} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}}$$

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* For companies which have multiple operations, such as gas, electric and/or nuclear power, the Commission utilizes only the investment relating to electric operations. However, in the computation of the taxes component, the total gross plant investment of all of the company's operations is utilized. The taxes paid by the utility generally relate to its entire operations.

$$\text{Administrative Expense} = \frac{\text{A/Cs } 661 + 662 + 663 + 664 + 665 + 668 + 669 + 674 + 677}{\text{Gross Plant Investment} - \text{Plant Depreciation Reserve}}$$

Maintenance Expenses = Account 602.1**

Taxes Paid = same as for Electric Companies

Note: A proceeding is pending before the Commission to change the Uniform System of Accounts. However, until that proceeding is completed, we will continue to use these accounts for pole attachments. *See* CC Docket No. 84-469, *supra.*

APPENDIX C

METHOD TO DISTRIBUTE THE ADMINISTRATIVE EXPENSES OVER THE EXPENSES SPECIFICALLY RELATED TO THE POLE PLANT

Derivation of the Distribution Ratio

Account No.	*Name*	*Location*
401	Operation Expenses	p. 115, line 4, col. e
402	Maintenance Expenses	p. 115, line 5, col. e
403	Depreciation Expense	p. 115, line 6, col. e
	Total Administrative and General Expenses	p. 323, line 167, col. b

Step 1: Total Expenses = Accounts 401 + 402 + 403

Step 2: Total Other Expenses = Total Expenses − Total Administrative and General Expenses

$$\text{Step 3: Distribution Ratio} = \frac{\text{Total Administrative and General Expenses}}{\text{Total Other Expenses}}$$

Derivation of the Maintenance Component

Account No.	*Name*	*Location*
	Total Admin. & Gen'l Exp.	p. 323, line 167, col. b
593	Maintenance of Overhead Lines (expense)	p. 322, line 118, col. b
364	Poles, Towers, and Fixtures	p. 203, line 59, col. g
365	Overhead Conductors	p. 203, line 60, col. g
369	Overhead Services	p. 203, line 64, col. g

** This account relates directly to CATV attachment maintenance and no further calculation is necessary. *See* Group W Cable, Inc. v. Wisconsin Telephone Co., Mimeo No. 4474 (released May 30, 1984).

Step 1: Maintenance Expense Increased by Administrative Expenses = Maintenance Expense (Account 593) + Maintenace Expense × Distribution Ratio

Step 2: Maintenance Component* (including share of admin. expenses) = $\dfrac{\text{Maintenance Expense Increased by Administrative Expenses}}{\text{Investment in Acc'ts } 364 + 365 + 369}$

Derivation of Depreciation Component

Account No.	*Name*	*Location*
	Depreciation Rate for Account 364	p. 200, line 22, col. b

Step 1: Depreciation Component* (incl. share of admin.) = Depreciation Rate for Account 364 + Depr. Rate (A/C364) × Distribution Ratio

Sample Using Hypothetical Numbers
Derivation of the Distribution Ratio

Account No.	*Name*	
401	Operation Expense	$1,100,000,000
402	Maintenance Expense	205,000,000
403	Depreciation Expense	203,000,000
	Total Administrative and General Expenses	150,000,000

Step 1: Total Expenses = $1,100,000,000 + $205,000,000 + $203,000,000

Total Expenses = $1,508,000,000

Step 2: Total Other Expenses = $1,508,000,000 − $150,000,000.

Total Other Expenses = $1,358,000,000

Step 3: Distribution Ratio = $\dfrac{\$150{,}000{,}000}{\$1{,}358{,}000{,}000}$ = .110

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[*] This calculation is based on gross figures. See Appendix B for method for converting gross figures to net figures.

Derivation of the Maintenance Component

Account No.	*Name*	
593	Maintenance of Overhead lines (expense)	$23,000,000
364	Poles, Towers and Fixtures	$225,000,000
365	Conductors	250,000,000
369	Overhead Services	75,000,000

Step 1: Maintenance Expense Increased by Administrative Expense = $23,000,000 + ($23,000,000 × .110)

Maintenance Expense Increased By Administrative Expense = $25,530,000

Step 2: Maintenance Component (Including Share of Admin. Expense) = $\frac{\$25{,}530{,}000}{\$225{,}000{,}000 + \$250{,}000{,}000 + \$75{,}000{,}000}$

Maintenance Component (Incl. Admin. Exp.) = 4.64%

Account No.	*Name*	
	Depreciation Rate for Account 364	2.50%

Step 1: Depreciation Component (including share of admin. expense) = 2.50% + (2.50% × 1.110) = 2.75%

APPENDIX D

Subpart J of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Subpart 1-Pole Attachment Complaint Procedures

1. Section 1.1402(d) is amended to read as follows:

> The term "complaint" means a filing by a cable television system operator, a cable television system association, a utility, or an association of utilities alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

2. Section 1.1402(e) is amended to read as follows:

   The term "complainant" means a cable television system operator, a cable television system association, a utility, or an association of utilities who files a complaint.

3. Section 1.1404(d)(1) is amended to read as follows:

   A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication;

4. Section 1.1404(d)(2) is amended to read as follows:

   A statement that the cable television operator currently has attachments on the poles.

5. Section 1.1404(g)(2) is amended to read as follows:

   The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

6. Section 1.1404(g)(4) is amended to read as follows:

   The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;

7. Section 1.1404(g)(5) is amended to add the following sentence:

   (If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole owned by the subject utility.);

8. Section 1.1404(g)(10) is amended by the addition of the following sentence:

   (With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate-of-return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate.);

9. Section 1.1404(h) is amended by addition of the following sentence:

   A utility should supply a cable television system operator the information required in paragraph (g) of this section, along with the supporting pages from its FERC Form 1, FCC Form M, or other report to a regulatory body within 30 days of the request by the cable operator. (The cable operator, in turn, shall submit these pages with its complaint). If the utility did not supply these pages to the cable operator in response to the information request, it shall supply this information in its response to the complaint.

10. Section 1.1404(i) is amended by the addition of the following sentence:

    If no such steps were taken, the complaint shall state the reason(s) for such omission.

11. Section 1.1409(b) is amended by the addition of the following sentence:

    If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate.

Diversification of Control of Mass Media
Ownership and Management, Integration of

Applicant not entitled to credit for integrated shareholders when shareholders have no financial interest, complete authority rests in nonintegrated owner and shareholders are a front for the nonintegrated owner. Ownership of monthly regional magazine with negligible circulation given no weight under the diversification criterion.
—*Caldwell Broadcasting Corp.* BC Docket No. 82-453

FCC 86-245

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
CALDWELL BROADCASTING CORPORATION Luling, Texas	BC DOCKET NO. 82-453 File No. BPH-810818AP
NEW THINKING, INC. Luling, Texas	BC DOCKET No. 82-456 File No. BPH-0819AP
LOCKHART RADIO ASSOCIATES, LOCKART RADIO, INC., GENERAL PARTNER Lockart, Texas	BC DOCKET No. 82-458 File No. BPH-810819BD
CENTRAL TEXAS FM BROADCASTING, INC. Luling, Texas	BC DOCKET NO 82-459 File No. BPH-810819BN
For Construction Permit For a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: May 12, 1986; Released: May 15, 1986

BY THE COMMISSION:

1. This proceeding involves mutually exclusive applications for a new FM station at Luling and Lockhart, Texas. In a Decision, 100 FCC 2d 115 (1985), the Review Board granted the application of New Thinking, Inc. (NTI). Now before the Commission are: Applications for Review filed February 14, 1985 by Caldwell Broadcasting Corporation (Caldwell), Lockhart Radio Associates, Lockhart Radio, Inc., General Partner (LRI) and Central Texas FM Broadcasting, Inc. (Central)[1]; a Protective Application for Review filed February 14, 1985 by NTI; Oppositions to the Applications for Review filed March 1, 1985 by Caldwell[2] and NTI[3]; a Motion to Strike filed March 5, 1985 by NTI[4]; Contingent Motions to Reopen the Record and Remand filed June 7, 1985 and August 27, 1985 by NTI; and a Motion to Strike, or in the Alternative Opposition to Contingent Motion, filed June 18, 1985 by Central.

2. We agree with the Board's determination in this case, but several matters warrant discussion. The Board awarded NTI a slight diversification preference because its principals have no media interests and Caldwell has an interest in *Texas Monthly*, a regional monthly magazine with a circulation of about 30,000 copies in the service area, and 103 copies in Luling. The appropriate weight to be given media interests under the diversification criterion varies according to the type of media, size of ownership interest, and the impact of that media on the community of license and the proposed service area. In the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394–95, the Commission said that ownership of small mediums of expression, such as weekly newspapers with less frequent publication, would have less significance than other broadcast interests.

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[1] On April 12, 1985 Central filed a Supplement to Application for Review..

[2] Caldwell filed individual oppositions to the Applications for Review filed by LRI, Central and NTI.

[3] On April 23, 1985 NTI filed an Opposition to the Supplement filed on April 12, 1985 by Central.

[4] NTI moved to strike Caldwell's multiple oppositions arguing that they total more than the 10 pages allowed by Section 1.115(f) of the Rules. On March 12, 1985 Caldwell filed an Opposition to the Motion to Strike. The Motion will be denied. Section 1.115(f) of the Rules does not prohibit multiple oppositions to multiple applications for review. *KIST Corp.*, FCC 85-512, n.1, released September 24, 1985.

The impact of a particular media interest is further diminished by factors such as low circulation and relevance to the community to be served. See, for example, *Greater Wichita Telecasting Inc.*, 96 FCC 2d 984 (1984), and *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982), *aff'd*, 55 RR 2d 23 (1983).

3. The *Texas Monthly* is a monthly, regional magazine, with a negligible circulation in the proposed community of license, and is geared to the interests of the people of the State of Texas, as opposed to purely local concerns. As reflected in the cases cited above, we have on occasion given some slight weight to such interests. However, after carefully considering this matter on the basis of the record compiled in this proceeding, we find that the impact of *Texas Monthly* as a media voice in Luling is so slight that it will be given no weight for the purposes of deciding this case.

4. In the Initial Decision, 100 FCC 2d 130 (1984), the ALJ denied Caldwell integration credit for the participation of Robert F. Botik, a 30% shareholder, and Rene Campos, a 10% shareholder. The ALJ found that they did not own *bona fide* interests in the applicant. Caldwell argues that the Board erred in failing to consider its exceptions and credit it for the integration of Botik and Campos. Caldwell asserts that Botik and Campos hold legal title under Texas law, that they would function as integrated owners, and that the Commission has accorded integration credit where there was no capital contribution and a gift of stock was intended to upgrade the application, citing *Las Misiones de Bejar Television Co.*, 93 FCC 2d 191 (Rev. Bd. 1983) and *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981).

5. It is undisputed that the Commission may look beyond the actual corporate structure to determine true ownership and control. *Henderson Broadcasting Co.*, 63 FCC 2d 419, 421 (Rev. Bd. 1977). The record establishes that Botik and Campos are fronts for Caldwell's 60% owner Mediatex Broadcasting Corporation, and Mediatex's sole Director and President, Michael R. Levy. Mediatex and Levy have contributed all of Caldwell's capital, and they negotiated a $1,000,000 loan to finance the station. Botik and Campos did not participate in arranging the loan, and Mediatex and Levy are the sole guarantors of the loan (Central Ex. 10; Tr. 329–331). Botik and Campos have made no financial contribution to the applicant. They have never exercised their rights as shareholders by attending meetings or electing directors (Tr. 356, 372). Moreover, while Botik and Campos hold legal title, before they became shareholders they entered into an

agreement under which Mediatex can require them to sell their stock to the applicant (Central Ex. 9). In contrast, Mediatex and Levy bear all the financial risks of the application. Levy has full authority over the applicant as its sole Director, and Mediatex and Levy are in a position to acquire full ownership whenever they wish. Mediatex and Levy will, therefore, be treated as the *de facto* 100% owners of Caldwell for integration purposes. *KIST Corp.,* FCC 85-512, released September 24, 1985; *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977).

6. As found by the ALJ, Caldwell's reliance on *Alexander S. Klein, Jr.* and *Las Misiones de Bejar* is misplaced. 100 FCC 2d at 158-59. In *Las Misiones*, the credited stockholder was financially responsible for his interest. *Klein* credited a 5% gift to a trusted former employee who would have a continuing voice in the operation of the proposed station. Here, neither Campos or Botik have any financial responsibility for their ownership interest and there is no evidence of a former relationship with either of them that would justify such a gift. Moreover, the circumstances surrounding the issuance of the stock, the prior execution of the option agreement, and the fact that Campos and Botik were not told that the stock was a gift until February 1983, almost a year after the stock was issued (Tr. 300-01, 369-86), undermine Caldwell's claim that it intended to make a *bona fide* gift of the stock. As a result, Caldwell is not entitled to integration credit for the involvement of Botik and Campos in the day-to-day operations of its proposed station.

7. NTI is credited for the 45% integration of its principals Mark and Nancy Grubbs. Thus, even eliminating the diversification demerit assessed by the Board for Caldwell's ownership of *Texas Monthly*, NTI remains the clear comparative winner.[5]

8. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(f) of the Rules, the Application for Review filed February 14, 1985 by Caldwell Broadcasting Corporation IS GRANTED to the extent indicated herein and in all other respects IS DENIED; and the Applications for Review filed February 14, 1985 by Lockhart Radio Associates, Lockhart Radio,

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[5] In this case, the Board awarded NTI enhancement credit for 22.5% female participation in the operation of its proposed station. In *Steele* v. *FCC*, No. 84-1176 (DC Cir. August 23, 1985), the Court set aside the Commission's practice of awarding preferences for female integration. Recently, however, the Court granted rehearing and vacated the panel's holding in *Steele*. Nevertheless, in light of NTI's strong preference for its quantitative integration proposal, NTI would still prevail even if no enhancement credit were given for its proposed female integration.

Inc., General Partners and Central Texas FM Broadcasting, Inc. ARE DENIED.

9. IT IS FURTHER ORDERED, That the Motion to Strike filed March 5, 1985 by New Thinking, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Protective Application for Review filed February 14, 1985 by New Thinking, Inc.; the Contingent Motions to Reopen the Record and Remand filed June 7, 1985 and August 27, 1985 by New Thinking, Inc.; and the Motion to Strike or in the Alternative Opposition to Contingent Motion, filed June 18, 1985 by Central Texas FM Broadcasting, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO *Secretary*

Information, Request for
Ownership and Management, Integration of

The Review Board affords parties in an adjudicatory proceeding involving a husband-wife limited partnership an opportunity to comment on the relevance of the Commission's Decision in *Absolutely Great Radio, Inc.*, FCC 86-250, released May 16, 1986, on the integration proposals of such partnerships.
—*Chester Associates*
MM Docket No. 84-525

FCC 86R-35

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Giraud Chester & Marjorie F. Chester d/b/a CHESTER ASSOCIATES East Hampton, New York	MM Docket No. 84-525 File No. BPH-830318AC
JOHN F. SEA, III East Hampton, New York	MM Docket No. 84-526 File No. BPH-830321AL
For Construction Permit for a New FM Station	

ORDER

Adopted: May 23, 1986; Released: May 29, 1986

BY THE REVIEW BOARD: BOARD MEMBER JACOBS CONCURRING WITH STATEMENT.

1. The Board has before it pending in abeyance, *see Chester Associates*, 102 FCC 2d 93 (Rev. Bd. 1985), the above-styled proceeding. Because the construction permit award in this case might well turn on the conditions under which married co-

applicants may be awarded vicarious credit for their proposed integration of ownership with active station management, we withheld action on this proceeding until the Commission disposed of the court's remand in *Ventura Broadcasting Co., v. FCC*, 765 F. 2d 184 (D.C. Cir. 1985), *remanding Absolutely Great Radio, Inc.*, 95 FCC 2d 1023 (1982) (hereinafter "*Absolutely Great I*"). On May 16, 1986, the Commission issued its remand-responsive decision, styled FCC 86-250 (hereinafter "*Absolutely Great II*").[1] We will not repeat the facts set forth in *Chester Associates*, *supra*, but incorporate that order for relevant background.

2. Our determination to await *Absolutely Great II* appears to have peen prudent because—at first blush—our reading of that new decision would seem to indicate that Mrs. Chester (65% equity interest) may not in this case be awarded vicarious "integration" credit on the basis of her husband's ownership of the remaining 35% equity interest in Chester Associates. In other words, Chester Associates may not here receive an *effective* 100% "integration" credit. Our preliminary reasoning to that effect is grounded on some very clear language of *Absolutely Great II*, where the Commission revisited the "spousal attribution" doctrine and iterated:

> As the [*Ventura Broadcasting*] court indicated, 'the crux of [our] integration calculus is the coincidence of legal responsibility for and actual participation in the station.' Consequently, ownership interests held by a husband and wife are ordinarily calculated separately for integration purposes.

Id., at para. 9 (footnote omitted). It went on, though, to observe:

> In several cases, however, we have permitted spousal attribution for integration purposes. We have done this only when the application has been filed by spouses as joint tenants.

Id. After explaining that it had in the past permitted one spouse the "attributed" credit of the other's equity for "integration" purposes "*only*" in joint tenancy situations, of which the right of survivorship is the grand incident, it went on to explain that it would continue to do so where both marital partners are named as co-applicants *solely* to accommodate the obvious estate planning motives of husband and wife. Thus, the Commission stated:

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[1] In its own decision in *Absolutely Great*, the Board had interpreted general Commission policy to regard as almost conclusively indivisible a marital co-ownership of a media interest. *See* 92 FCC 2d 1171 at 1173-1176. The Board's reasoning followed from the Commission's declaration in *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 426 (1981), that "[w]e do not accept a disclaimer of active interest or participation in a commonly owned entity . . . ." However, the Commission reversed that interpretation, holding that a co-owning spouse could disclaim active interest or participation for "integration" purposes, but not for "diversification" purposes. *See Absolutely Great I*, 95 FCC 2d at 1026-1027.

> Our intent is to recognize [for vicarious "integration" credit] those situations where one spouse is an owner in name only while the other will exercise complete control over the entire joint interest.
>
> * * *
>
> However, because the survivorship attribute of joint tenancies, which is responsive to the estate planning motive, is not found in other forms of ownership we will not attribute ownership in non-joint tenancy situations. Nor do we anticipate attributing ownership in non-spousal relationship where the estate planning motive for forming a joint tenancy is not paramount.

Id., at para. 10. And finally:

> To summarize, we will attribute the interest of one spouse to the other for integration purposes where the spouses represent that only one of them is the intended actual owner, that the active spouse would exercise exclusive control and be the financial force behind the joint interest, and that the other spouse is given a totally derivative ownership interest as a joint tenant for estate planning purposes. Also, the inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor. These provisions are necessary to limit attribution to the most obvious cases and avoid undue delay of these proceedings.

Id., at para. 11.

3. In the instant case, the Chesters do not come before us as joint tenants in the ownership of their applicant. Nor do they claim that estate planning or survivorship motives are involved in their partnership application. Rather, they now come before us with Mrs. Chester purporting to be a "general" partner and her husband a "limited" partner.[2] Thus, they seek the spousal attribution of Mr. Chester's 35% equity interest to Mrs. Chester so that they might reap a 100% effective "integration" credit for Mrs. Chester's proposed management of their potential station, relying therefor on the holding of *Anax Broadcasting, Inc.*, 87

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[2] Until the "B" cut-off deadline, the Chesters were both specified as "general" partners. On that deadline, they submitted a two-page amendment substituting a "limited" partnership agreement, the efficacy of which raised obvious questions. *See Chester Associates*, *supra*, 102 FCC 2d at 94–97. These questions were compounded by the fact that, prior to their eleventh-hour amendment, Mr. Chester appears to have been the prime mover of the application. *See id.*, at 95–96.

FCC 483 (1981).[3] In *Anax*, the Commission held that the equity interests of "limited" partners, being "passive," were not to be counted for comparative licensing purposes, including the element of "integration." Because the equity interests of "general" partners only are to be recognized as "active" principal control, a sole "general" partner having, for example, a 50% equity interest could be considered as having an *effective* 100% control of the management of the station, and therefore be credited with an extrapolated 100% "integration" credit. For a more complete discussion of this phenomenon, *see Independent Masters, Ltd.*, FCC 86R-33, released May 23, 1986, at paras. 9-16.

4. We suppose that it could be argued that *Anax* and *Absolutely Great* are separate lines of cases running—as railroad tracks—without converging, *an infinitum*. And, therefore, that *Absolutely Great II* does not deal with "limited" partnership agreements between husband and wife, nor prevent Mrs. Chester from here asserting *Anax* as the basis for the grant of a 100% (effective) "integration" credit to Chester Associates. It is also a fact that the Commission has recently accepted the concept of *bona fide* "limited" partnership agreements between husband and wife for certain of its regulatory purposes. *See Attribution of Ownership*, 58 RR 2d 604, 620 (1985) (reconsidering 97 FCC 2d 997 (1984)). [4]

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[3] Indeed, vicarious attribution of Mr. Chester's erstwhile 35% "general" partnership interest may have been the primary, if not the solitary, reason for the last minute amendment of that application to a purported "limited" partnership. *See Chester Associates, supra*, 102 FCC 2d at 96, where we noted Mrs. Chester's testimony that the switch was made on the advice of their lawyers because:

> They said, 'Your application might be enhanced by the fact that you are a woman. There will be 100% integration.'

[4] In that reconsideration order, the Commission stated (58 RR 2d at 620; footnotes omitted):

> With respect to the specific situation in which a marital relationship is involved, we have previously determined that the interests held by one spouse are to be presumptively attributed to the other. Notwithstanding the nearly conclusive stature the Commission has accorded this presumption in the past, we will henceforth permit this presumption to be rebutted, on a case-by-case basis, in appropriate circumstances.

See also Chester Associates, supra, 102 FCC 2d at 94-95, where we recognized that change in Commission policy. However, it was precisely the Board's interpretation of policy to align the indivisibility of maritally co-owned media interests that the Commission rejected in *Absolutely Great I* (*see supra* note 1). There the Commission held that the presumption of common marital control of its rules relating to diversification of the mass media had not been, and would not be, extended to comparative licensing "integration" calculations. *See* 95 FCC 2d at 1026. From our reading of *Absolutely Great II*, the Commission has

5. On the other hand, we cannot avoid the strong language of *Absolutely Great II* holding that one spouse may claim a putatively "passive" marital partner's equity interest for "integration" purposes "*only*" in joint tenancies and where the survivorship motive is both "*obvious*" and "*paramount.*" Nor can we ignore the plain meaning of its declaration that for "integration" purposes "we will *not* attribute ownership [as betweeen spouses] in *non-joint tenancy* situations." *Id.*, at para. 10 (emphasis added). In fact, the entire impact of the Commisison's carefully reconsidered and crafted "spousal attribution" limitations *in Absolutely Great II*, intended sidestepped easily by the facile act of structuring an application so that one marital partner is denominated a "limited" partner (or a "preferred" shareholder). This, we must say, seems highly improbable, particularly in view of transcendent tenor of *Absolutely Great II*. *E.g.*, "[t]hese provisions are necessary to limit attribution to the *most obvious* cases and avoid undue delay of these proceedings." *Id.*, at para. 11 (emphasis omitted).[5] We share the Commission's aversion to hearings over potential spousal "passivity",[6] and agree that limiting such assumptions as per the apparent intent of *Absolutely Great II* would avert such dubious inquiries.

6. Because, as noted, this case may well turn on the comparative issue of quantitative "integration" credit, and because the parties have not had the opportunity to study or brief the impact, *vel non*, of *Absolutely Great II*, we shall allow those parties to comment on that case and on our tentative interpretation thereof.

7. ACCORDINGLY, IT IS ORDERED, That the parties MAY FILE comments addressing the impact that *Absolutely Great Radio, Inc.*, FCC 86-250, released May 16, 1986, has on this proceeding within ten (10) days after the release date of this

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not receded from that basic dichotomy. That is, save for joint tenancies by marital partners established solely for estate planning purposes, "ownership interests held by a husband and wife are ordinarily calculated separately for integration purposes." *Id.*, at para. 9 (footnote omitted).

[5] Such delay, as the Commission sagely anticipated, would be unavoidable in our instant case, where the purported switch to "passivity" of the husband/spouse is anything but "obvious." *See Chester Associates, supra*, where we noted the husband's active role in prosecuting the application, 102 FCC 2d at 95-96, his past or potential financial support, *id.* at 96 n. 12, and the fact that he had not even testified at the hearing, let alone demonstrated by the record evidence a likely "passivity." *Id.*, at 97-98. Further hearing on this matter of the husband's change to a putative "passivity" would be necessary to credit this claim.

[6] See the Board's discussion in its *Absolutely Great* decision on this very point, 92 FCC 2d at 1175-1176.

Order, and reply comments five (5) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Concurring Statement of Board Member Jerold L. Jacobs

While I endorse the subject Order's invitation to the parties to this proceeding to comment on the relevance of *Absolutely Great Radio, Inc.*, FCC 86-250, released May 16, 1986, to a final disposition, I do not share the majority's "tentative interpretation" of *Absolutely Great*, and believe that the Order's lopsided presentation on the matter will diminish the value of the responsive briefs. Hence, I herewith offer for the parties' comments a fuller elaboration of the proposition that *Absolutely Great* does not address the ownership integration implications of limited partnership agreements between spouses and, hence, has no relevance to the instant proceeding.

At the outset, it is important to note that the ownership arrangement under scrutiny in *Absolutely Great* was a joint tenancy by William Shearer and his wife, not a limited partnership, and that the Court of Appeals remanded the case to the Commission solely because "the Commission's refusal to allow spousal attribution of the Shearers' martial joint tenancy interests was inadequately explained." *Ventura Broadcasting Co.* v. *FCC*, 765 F. 2d 184, 195 (D.C. Cir. 1985). As correctly described by the Court, "spousal attribution" is the policy of attributing to a spouse who will be integrated into a station's management quantitative ownership credit derived from the non-participating spouse's ownership interest. 765 F.2d at 187. Furthermore, it is clear that such attribution has occurred only in the joint tenancy context. *Id.* at 188 n. 2; *Absolutely Great, supra*, para. 9.

The first Commission decision to address spousal ownership interests held in joint tenancy was *East St. Louis Broadcasting Co.*, 19 FCC 2d 300, 15 RR 2d 219 (Hearing Ex. 1969), *aff'd*, 29 FCC 2d 170, 21 RR 2d 992 (1971). While that case exhibited a "structural" approach to the question, focusing on the generic legal ramifications of the property law concept of joint tenancy, its progeny emphasized a factual, "functional" analysis of each ownership integration proposal, especially the question whether the integrated spouse had effective voting control over the entire ownership interest. *E.g.*, *New Continental Broadcasting Co.*, 88

FCC 2d 830, 838, 50 RR 2d 1117, 1124-25 (Rev. Bd. 1981) (subsequent history omitted) (spouse will defer to husband in all matters, and husband alone will vote entire joint interest). However, in *Absolutely Great*, *supra*, para. 11, the Commission made it clear that it does not deem spousal attribution factual inquiries to be cost-effective and has narrowly defined the factual circumstances under which spousal attribution will be permitted in joint tenancies in the hope of obviating most such inquiries. *Id.*

The history of the Commission's concern for the nuts and bolts of limited partnerships has been very different. In *Anax Broadcasting Co.*, 87 FCC 2d 483, 488, 49 RR 2d 1589, 1594 (1981), a limited partnership case not involving spouses, the Commission held for the first time that a general partner's ownership integration credit would be unaffected by the non-participation of limited partners, because limited partners are passive investors and have no authority to control the licensee. In other words, as elaborated shortly thereafter in *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 585, 51 RR 2d 1478, 1480 (Rev. Bd. 1982), *rev. denied*, FCC 83-415 (Comm'n 1983), *aff'd mem. sub-nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D.C. Cir. April 26, 1985), and *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 510, 52 RR 2d 1210, 1213 (Rev. Bd. 1982), *rev. denied*, 55 RR 2d 23 (Comm'n 1983) (subsequent history omitted), fully integrated general partners are entitled to integration credit commensurate with the extent of their legal authority and voting power, even if they have much smaller equity interests in the enterprise. Thus, in *Central Texas*, a single general partner with a 1% equity interest but total control over a limited partnership was awarded 100% integration credit, as were the two general partners with an 80% equity interest in *Merrimack*. From the beginning, the analysis of limited partnerships has been a factual, functional one, in which augmented integration credit is only awarded upon proof of management autonomy and voting control in the hands of the putative general partner(s). *Central Texas*, *supra*; *Merrimack*, *supra*.

Indeed, with the passage of time, the Commission has steadily increased its concern with the *de facto bona fides* of the limited partnership ownership mechanism. Thus, in *Attribution of Ownership Interests*, 97 FCC 2d 997, 1022-23, 55 RR 2d 1465, 1485 (1984), the Commission exempted limited partnership interests in mass media from the multiple ownership rules when such partnerships meet the requirements of the Uniform Limited Partnership Act of 1976 and the limited partners are not involved in any material respect in the management of the subject media. However, upon reconsideration, 58 RR 2d 604, 613-20 (1985), the Commission declared those safeguards inadequate and added a number of additional strictures on the content of limited partnership agreements and the conduct of limited partners. Nevertheless, at the same time the Commisison specifically held that although previously the media interests of one spouse were presumptively attributed to the other, "we will henceforth permit this presumption to be rebutted, *on a case-by-case basis*, in appropriate circumstances [where the new limited partnership strictures are met]." *Id.* at 620 (emphasis added). And in comparative broadcast adjudications, the Commission recently upheld the Board's searching scrutiny of a suspect partnership agreement (although it disagreed with our legal conclusions), *KIST Corp.*, 102 FCC 2d 288, 58 RR 2d 1483 (1985), and announced the prospective application of the reconsidered *Attribution of Ownership Interests* limited partnership standards in media diversification comparative analyses, *Daytona Broadcasting Co., Inc.*, FCC 86-182, released April 18, 1986, at n. 6.

Under these circumstances, I am reluctant to conclude without an explicit statement by the Commission that *Absolutely Great* was intended to automatically veto augmented integration credit for limited partnership integration proposals involving spouses. The preceding history indicates that this augmented credit flows from the *voting power and control* of the general partner, not from his or her *marital status*. Thus, an adjudication such as *Absolutely Great*, which is expressly devoted to "spousal attribution" questions only, and never once mentions the phrase "limited partnership," should not be read to control, *sub silentio*, a completely distinct line of legal precedent. While it cannot be gainsaid that the Commission clearly does not wish the vagaries of spousal joint tenancies to be litigated in the future, *see Absolutely Great*, *supra*, it has shown increasing interest and sustained patience with limited partnership adjudications as recently as April 18, 1986 (*Daytona Broadcasting Co.*, *supra*). The *Absolutely Great* decision will probably be adequate to stifle joint tenancy as a viable broadcast ownership integration mode henceforth, but, given the current popularity and versatility of limited partnerships for media ownership arrangements, more precision, depth of analysis, and notoriety can be expected from the Commisison before I could even "tentatively" conclude that *Absolutely Great* was intended to automatically discredit spousal limited partnerships for ownership integration purposes.

Divestiture
Forfeiting
Stay Pending Appeal

Orders requiring telephone company to divest affiliated cable TV systems because of violations of cross-ownership rules and to pay forfeiture for willful and repeated violations of Rule 63.64 and Section 214 of Communications Act temporarily stayed in part.
—*Comark Cable Fund III*

FCC 85-634

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

COMARK CABLE FUND III, d/b/a
CCI CABLEVISION,

Complainant

v.

NORTHWESTERN INDIANA
TELEPHONE COMPANY, INC.

and

NORTHWEST INDIANA CATV,
INC. d/b/a
NORTHWESTERN INDIANA
CABLEVISION,

successor to

RHYS MUSSMAN d/b/a
NORTHWESTERN
INDIANA CABLEVISION,

Defendants

File No.
E-84-1

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1985; Released: December 9, 1985

BY THE COMMISSION: COMMISSIONER PATRICK DISSENTING IN PART AND ISSUING A STATEMENT.

1. Before the Commission for consideration is a "Petition for Stay Pendente Lite" ("Petition") filed on September 16, 1985 jointly by Northwestern Indiana Telephone Company, Inc. ("NITCO") and Northwest Indiana CATV, Inc. ("Northwest Cable"), (referred to jointly hereinafter as "Defendants"). Defendants seek a stay of our order in *Comark Cable Fund III*, 100 FCC 2d 1244 ("Order"), *reconsideration denied, Memorandum Opinion and Order*, FCC 85-475, released August 23, 1985, *appeal docketed*, No. 85-1542, D.C. Cir., August 29, 1985 ("*Reconsideration Order*") in the above-captioned proceeding.[1]

Background

2. The instant proceeding was initiated on October 12, 1983 when CCI filed a complaint, pursuant to Section 208 of the Communications Act, against NITCO and Northwest Cable's predecessor, Rhys Mussman d/b/a Northwestern Indiana CableVision. The gravamen of CCI's complaint was that Defendants were affiliated companies engaged in discriminatory and anticompetitive conduct in violation of the Act and our telephone/cable television cross-ownership rules. More particularly, CCI alleged, *inter alia*, that NITCO was constructing and operating a cable television system in Hebron and constructing a cable television system in DeMotte, Indiana, both within its telephone service area, without Commission authorization and to CCI's detriment, in violation of Section 214(a) of the Act and Section 63.54 of the Commission's Rules, 47 U.S.C. § 214(a) and

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[1] Also before us is a petition for leave to file an opposition to the Petition, filed by Comark Cable Fund III d/b/a a Cablevision ("CCI") on September 26, 1985. Comments filed by CCI on September 16, 1985 with respect to an "Emergency Motion for Stay Pendente Lite" filed by Defendants with the United States Court of Appeals for the District of Columbia Circuit of September 23, 1985 ("Emergency Motion"); and a motion for leave to respond and a response to such comments, filed by Defendants on November 8, 1985. Following a private settlement reached by the parties, CCI requested dismissal of both its complaint and an opposition to the Petition it had filed on September 26, 1985 ("Opposition"). In the order granting those requests, Defendants were informed that, notwithstanding the private settlement with CCI, they continued to be bound by our orders in this proceeding. Order, Mimeo No. 1183, at para. 3, released December 2, 1985. Despite the settlement, we must still address the issues raised in Defendants' Petition.

47 C.F.R. § 63.54, respectively. In addition to seeking the issuance of an order to show cause why NITCO and Northwest Cable should not be ordered to cease and desist from such alleged violations, CCI also sought compensatory and punitive damages.

3. In our March 18, 1985 *Order*, we found that Defendants had violated and were acting in continuing violation of Section 63.54 of our telephone/cable television cross-ownership rules and Section 214 of the Act because they had constructed cable television distribution facilities within NITCO's telephone service area in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana, without having petitioned the Commission and obtained a waiver of such rules and approval of an application to construct facilities. We directed that these, as well as any other unauthorized cable television system facilities, be divested by September 18, 1985. We also notified NITCO of its apparent liability for a $20,000 forfeiture penalty. We further ordered Defendants and CCI to undertake food faith efforts to negotiate a settlement of CCI's damage claims.[2]

4. NITCO sought reconsideration of our *Order*, arguing that we had erred in finding that Defendants were affiliated companies within the meaning of Section 63.54 of our Rules. NITCO also argued that Rhys G. Mussman[3] should be allowed to continue providing video programming to viewers in Hebron and Lakes of the Four Seasons.[4] In denying reconsideration, we confirmed that the divestiture required by our *Order* applied not only to NITCO, but to Northwest Cable and Rhys Mussman. We also directed NITCO to pay the $20,000 forfeiture for which we had found it liable.

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[2] *Order*, at 1259. CCI formerly operated a cable telvision system in Hebron, Indiana, which it sold to First PIC Acquisition Corporation. CCI's complaint alleged that Defendants were affiliated companies acting anticompetitively and that it was damaged by such anticompetitive behavior. In his capacity as NITCO's Executive Vice President, Rhys Mussman conducted pole attachment negotiations with CCI and its predecessor-in-interest even though he, himself, had been directly engaged in efforts to secure cable television franchises in the same communities for his own cable television operations.

[3] Rhys C. Mussman is the president and sole officer, director, and shareholder of Northwest Cable which does business under the name Northwestern Indiana Cablevision. He operated the company as an individual proprietorship under the same name before its incorporation in April of 1983. Mr. Mussman is the son of Robert G. Mussman, NITCO's president, chairman and controlling stockholder, and served as NITCO's Executive Vice President prior to 1983 and as a consultant to NITCO until May 28, 1985 with essentially the same salary and benefit package he received under his prior title.

[4] Service in DeMotte has not yet commenced, although the system has been largely constructed.

5. Public notice of our *Reconsideration Order* was given on August 20, 1985. The next day, officials of our Common Carrier Bureau's Enforcement Division met with counsel for the parties to determine what steps, if any, Defendants had taken and planned to take to comply with the good faith settlement efforts and divestiture requirements mandated by our *Order*. Counsel for Defendants advised that, NITCO planned both to appeal the Commission's *Reconsideration Order* and to request that the Commission stay its *Order*. The parties were advised that, based on precedent, the possibility of favorable action on such a stay motion by the Commission was unlikely but could be enhanced if the cable systems in question were placed in a trust arrangement pending a final court decision on NITCO's planned appeal. This was intended to permit Defendants to maintain the status quo, an equivalent financial position, but not to benefit from their continuing illegal actions in the event their appeal was unsuccessful. On the other hand, a trusteeship would permit the benefits of operation to flow back to Defendants in the event they were successful on appeal. With the assistance of the Bureau, the parties subsequently met several times and attempted to reach an agreement upon terms of an interim trust arrangement which would protect the interests of all those affected, including the public, pending a judicial determination on the merits of Defendants' pending appeal of our *Order*. However, such efforts were temporarily suspended at a September 9 meeting of the parties with Bureau officials when Northwest Cable's counsel advised that it was pursuing a sale of its cable systems to an alleged unaffiliated entity and the prospect of a sale appeared imminent.

6. On September 12, 1985, Defendants filed a joint motion seeking a thirty day extension, until October 18, 1985, of the September 18, 1985 date by which they had to divest cable television facilities they constructed without FCC authorization and in violation of our cross-ownership rules. Further, Defendants sought to extend, also until October 18, 1985, the date by which we had ordered NITCO to pay a $20,000 forfeiture. Although the Bureau agreed with CCI's characterization of such motion as an eleventh-hour plea, it granted a short extension of the divestiture date until September 30, 1985, solely in order to enable further continuing efforts to consummate a trust arrangement protecting the rights of all parties and those of the public, pending a final judicial determination of this matter. Further, the Bureau extended the date by which NITCO was to pay the forfeiture we

had ordered until September 30, 1985 as well.[5] Counsel for the parties subsequently met with Bureau staff in further efforts to negotiate a satisfactory interim trust agreement. However, such efforts were finally abandoned on September 20, 1985 when counsel for Northwest Cable advised the Enforcement Division staff that there was little, if any, likelihood, that a trust agreement satisfactory to his client could be negotiated.

Defendants' Petition for Stay

7. In support of their Petition for stay of our *Order*, Defendants contend: 1) that they need not show that they will prevail on the merits of their appeal; 2) that Northwest Cable will suffer irreparable harm if the requested stay is not granted; 3) that no harm will result to other interested parties if the stay is granted; and 4) that the public interest would be served by issuance of the stay in order to preserve a continuity of cable television service to approximately 1,300 residences. In arguing that they are likely to obtain a reversal of our *Order*, Defendants contend, *inter alia*: 1) that our cross-ownership rules are overbroad; 2) that we engaged in unlawful summary fact-finding; and 3) that we invoked our Rules inconsistently.

8. On the other hand, CCI maintained that the Petition must be denied because, under applicable Commission and court decisions, Defendants have not justified the stay which they have requested.[6] In particular, CCI argued that the public interest is disserved every day that Northwest Cable continues to operate since Defendants will continue to profit from their anticompetitive behavior. It further argued that Defendants' chance of success on appeal is extremely remote. Finally, CCI contended that, during this two-year old proceeding, Defendats have shown no deference to our jurisdiction or mandate and have not been dealing with the Commission in good faith. Accordingly, CCI argued that Defendants cannot be trusted, have "unclean hands", and are not worthy of special equitable relief.[7]

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[5] *Memorandum Opinion and Order*, released September 18, 1985, unreported. The September 30 deadlines were further extended by the Bureau to preserve the status quo pending our action on the instant Petition and action by the Court upon the Emergency Motion. Letter to Russel D. Lukas and David L. Nace from Chief, Common Carrier Bureau, dated September 24, 1985.

[6] CCI requested leave to file its Opposition three days late due to confusion over the impact on Commission action of the Emergency Motion before the U.S. Court of Appeals. Defendants did not oppose such request.

[7] Opposition at 14–19.

Discussion

9. In determining whether or not to grant a stay request, the Commission generally considers the following four factors: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without the requested relief, it will be irreparably injured? (3) Would issuance of a stay substantially harm other parties interested in the proceedings? (4) What action is in the public interest? *Virgnia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 978 (1981). These issues need to be explored separately for the matters of divestiture and forfeiture. *Holiday Tours* indicates that the first of these factors may be more liberally construed if the movant has made a substantial case on the merits and "the other three factors strongly favor interim relief". 559 F. 2d at 843. After examining Defendants Petition in light of these criteria, we find, with respect to divestiture, that, while their argument has little chance of success on appeal and that granting their motion, as filed, would harm both other interested parties and the public interest, nonetheless, it is possible that Defendants might suffer irreparable injury if divestiture were completed before the unlikely event that they were successful at the Court of Appeals. Our responsibility, therefore, lies in finding a mechanism to protect the public interest and minimize injury to other parties while Defendants are permitted to exhaust their legal remedies. Only by placing the cable television facilities subject to our divestiture orders in trust can the interests of all parties, including the public, be protected. By so doing, Defendants will not be required to prematurely divest themselves of their cable systems if they are ultimately successful on appeal; Defendants will not be able to profit from continued anticompetitive and illegal activities should they lose on appeal;[8] and the public will not be deprived of continual cable television service. Accordingly, with respect to divestiture, we will stay the effectiveness of our

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[8] *See* Appendix at para. 9 where trust conditions we have ordered require all profits accruing during the trusteeship to be donated to a charitable organization should Defendants lose on appeal. A similar result was required in CC Docket No. 20939 by Memorandum Opinion and Order, FCC 82-484, at para. 5, released November 3, 1982, where we granted continuing authority to operate certain radio facilities conditioned, *inter alia*, upon the distribution of certain profits to a charitable organization. *See* Pass Word, Inc., 93 FCC 2d 1284, 1285 (1983).

Order subject to the imposition of the interim trust conditions specified in the Appendix hereto.

10. Turning to the matter of the forfeiture, we find Defendants' position to be unpersuasive. While all the public interest arguments relating to divestiture remain relevant, there is not a countervailing argument of irreparable injury. Defendants have never alleged that they lack the financial resources to pay the forfeiture, and in the event they are successful on appeal, the funds can, of course, be promptly returned. Therefore, the petition for stay will be denied with respect to the forfeiture.

Likelihood of success on the merits

11. Defendants contend that our telephone/cable television cross-ownership rules are overbroad and do not provide a "clear and complete statement which will give adequate prior notice of a standard by which conduct can be measured", citing *Pressley v. FCC*, 437 F. 2d 716, 721 (D.C. Cir. 1970). This position is utterly without merit. In *Pressley*, the Court expressed "some feeling of unease" that we had never instituted any rulemaking proceeding to provide a clearer guide to the kinds of conduct which would be regarded as disqualifying under our policy concerning the filing of so-called "strike" applications. On the other hand, our telephone/cable television cross-ownership policies, rules, and guidelines were adopted in 1970 pursuant to a rulemaking proceeding, long before Defendants commenced their unlawful construction. Thus, Defendants had adequate prior notice of the applicable standard. The attribution standards applicable under Section 63.54 of our Rules, 47 C.F.R. § 63.54, are clearly defined and specific examples delineated in Note 1 to that rule. Further, under Sections 63.56 and 63.58 of our Rules, waiver of otherwise prohibited relationships may be granted for good cause shown in a duly filed application pursuant to Part 63 of our Rules. Our telephone/cable television cross-ownership rules have been judicially affirmed[9] and have withstood the test of time since they were first promulgated more than fifteen years ago. Further, our rules, for the most part, were recently codified with the adoption of the Cable Communications Policy Act of 1984, 47 U.S.C. § 601, *et seq.*, ("Cable Act"). *See* Title VI of the Act, particularly Section 613(b). We consciously chose to retain the current attribution rules, as recommended by the Department of Justice and numerous cable interests, when we implemented the Cable Act. We found nothing

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[9] General Telephone Co. of the Southwest v. U.S., 449 F. 2d 846 (5th Cir. 1971).

in the Cable Act or its legislative history to indicate that Congress believed any change in this respect would be desirable.[10]

12. Furthermore, our finding that Defendants were affiliated companies within the meaning of Section 63.54 of our Rules is supported by substantial, uncontradicted evidence of record. Such evidence was submitted, for the most part, by Defendants themselves. Because Defendants were and continue to be, in fact, "affiliates" within the meaning of Note 1(a) to Section 63.54, they have and are engaged in anticompetitive behavior which our cross-ownership rules were designed to preclude. Contrary to Defendants' argument, we did not simply presume "control" or an "affiliate" relationship within the meaning of Section 63.54 from the fact of the father-son relationship between Robert and Rhys Mussman. In enforcing such rule, we properly disregarded the separate corporate veils of NITCO and Northwest Cable because of prohibited direct and indirect business and financial relationships between Defendant corporations, in addition to the business and financial relationships, irrespective of their familial relationship, between Robert Mussman and Rhys Mussman, the principals of NITCO and Northwest Cable, respectively. As we summarized at para. 3 of our *Reconsideration Order*, our *Order* found that:

> Defendants had been involved in a number of direct and indirect relationships, each of which was and continues to be prohibited by Section 63.54 of our Rules. Such relationships included, *inter alia*:
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> (a) guarantees of substantial bank loans to Northwest Cable by Robert Mussman, NITCO's chairman, president and controlling stockholder;
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> (b) Robert Mussman's guarantee of an indemnity agreement by his son, Rhys Mussman, for Northwest Cable concerning litigation Rhys Mussman instituted against the Town of Hebron with respect to cable television;
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> (c) NITCO's retention of Rhys Mussman on its payroll, including employee benefits, after his resignation as its Executive Vice President from January 1, 1983 through a period when he was not receiving any salary as president of Northwest Cable, but while he was active in cable management;
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> (d) Robert Mussman's lease of office space to Northwest Cable;
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> (e) Robert Mussman's acceptance or acquiescence in NITCO's subleasing of his property to Northwest Cable for the site of the headend of its

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[10] In the Matter of Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, FCC 85-179, released April 19, 1985, at para. 58; 58 R.R. 2d 1, 16-17.

Hebron cable television system;

(f) agreements by which NITCO constructed and agreed to maintain cable television facilities for Northwest Cable in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana; and

(g) lease agreements by which NITCO furnished space on its poles for Northwest Cable's cable television systems in those communities.

While Defendants acknowledge these relationships, they have never sought waiver of Section 63.54 with respect to any of them.[11]

13. Although our *Order* was supported by factual findings based upon evidence in the record submitted largely by Defendants, we did not find that we could agree with the ultimate legal conclusions Defendants argued should have been drawn from such evidence. Nor did we find that we could rely upon every factual representation made by Defendants or their principals. We note, in this connection, that Rhys Mussman made inaccurate representations either to this Commission or to public officials of the Town of Hebron, Indiana. Specifically, Mr. Mussman represented to the Commission that his father, Robert Mussman, had never served as Secretary-Treasurer or as any other officer of any cable company in which he, Rhys Mussman, was involved.[12] However, speaking on behalf of his company (*i.e.*, Rhys G. Mussman d/b/a Northwestern Indiana CableVision) at a public meeting before the Board of Trustees of the Town of Hebron on April 28, 1982, Rhys Mussman represented that his father was then Secretary-Treasurer of his cable company.[13] Further, while the record is clear that Rhys Mussman, as President of Northwestern Indiana Cablevision, submitted cable television proposals to public officials of Hebron and DeMotte in 1980,[14] he initially represented to us that it was not until February 1, 1983 that he began doing business under that name.[15]

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[11] These facts were all ascertained from Defendants' filings and were not contested. *See, e.g.* Amended Answer of NITCO filed May 18, 1984.

[12] "Response to Consolidated Reply to Amended Answers of .Northwestern Indiana Telephone Company, Inc. and Norhtwest Indiana CATV, Inc.", filed July 9, 1984, at para. 4; *see also* "Reply to Opposition to Petition for Reconsideration of Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture", filed by NITCO on May 17, 1985, at para. 29.

[13] "Consolidated Reply to Amended Answers of Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc.", filed by CCI on June 11, 1984, Exh. A, at 1 and 6.

[14] Amended Answer of Northwest Cable, Exh. 7 and 10.

[15] "Answer of Northwest Indiana CATV, Inc." filed November 28, 1983, at paras. 2 and 6.

14. Contrary to Defendants' further contention that our orders were based upon disputed factual allegations requiring a full evidentiary hearing to resolve, our orders were based upon uncontroverted evidence which, as already noted, was furnished largely by Defendants themselves.[16] In any event, it is black letter law that when the decisionally-significant facts in a complaint proceeding pursuant to Section 208 of the Act, 47 U.S.C. § 208, are undisputed and only the legal conclusions derived therefrom are controverted, we have ample discretion, and our practice almost universally has been, to resolve the matter upon the basis of the evidence of record without need of resorting to time-consuming and costly full evidentiary proceedings.[17] Section 208 provides, in pertinent part, that if any common carrier subject to this Act does not satisfy a complaint served upon it by the Commission within the time specified or there is reasonable ground for investigating the complaint, "it shall be the duty of the Commission to investigate the matters complained of *in such manner and by such means as it shall deem proper*" (emphasis added).[18] Our *Order* was issued pursuant to, *inter alia*, Sections 208 and 214(a) of the Act.[19] As CCI correctly noted in opposing Defendants' untimely request for a hearing, neither section mandates any particular form of proceeding for all cases. Under the applicable statutory provisions, we had discretion to undertake enforcement action in this matter by means other than a costly and prolonged full evidentiary hearing before an administrative law judge.[20] We note, in this connection, that in asking

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[16] It should be emphasized that Defendants did not request a full evidentiary hearing until long after our *Order* was issued. Letter from Pamela L. Gist to Howard M. Wilchins, Deputy Chief, Enforcement Division, dated July 31, 1985. Such request was denied. Letter to David L. Nace and Pamela L. Gist from Howard M. Wilchins, dated August 21, 1985. For Defendants to come in at this late date with such an argument is unfounded in principles of law and equity and appears solely intended to obfuscate the real issues in this proceeding.

[17] *See* Bell Telephone Co. of Pennsylvania v. FCC, 503 F. 2d 1250, 1266 (3d Cir. 1974), *cert. denied* 422 U.S. 1026, *reh. denied* 423 U.S. 886 (1975); *cf.*, United States v. FCC, 652 F. 2d 72, 90–91 (D.C. Cir. 1980) (*en banc*); Southwestern Operating Co. v. FCC, 351 F. 2d 834, 835 (D.C. Cir. 1965); Anti-Defamation League v. FCC, 403 F. 2d 169, 171 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969); Mobilfone of Northeastern Pennsylvania, Inc. v. FCC, 682 F. 2d 269, 271 (D.C. Cir. 1965); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F. 2d 621, 630 and n. 34 (D.C. Cir. 1978) (*en banc*); *See also* 47 U.S.C. 154(j) and FCC v. Schreiber, 381 U.S. 279, 289 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (194).

[18] *See also* 47 U.S.C. § 154(i) and (j); Bunker–Ramo v. Western Union Telegraph Co., 25 FCC 2d 691 (1970).

[19] *Order* at 1259.

[20] *Cf., Heckler v. Chaney*, U.S. , 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). As we said in Department of Defense v. AT&T, 80 FCC 2d 287 (1980):

that CCI's complaint be dismissed, Defendants did not contend that the critical legal issue raised therein, *i.e.*, whether they were affiliated companies within the meaning of our cross-ownership rule, could be resolved only after a full evidentiary hearing, rather than upon uncontroverted evidence in their pleadings. On the contrary, in opposing CCI's motion for pre-designation discovery, Defendants represented their willingness to cooperate to the fullest extent to help us resolve CCI's complaint upon the latter basis.[21] Furthermore, in finding willful violations of the Act and our cross-ownership rules, we did not need to nor did we find that Defendants deliberately intended to violate those rules. In order to find liability for forfeiture, it was necessary to find, as our *Order* did, only that "they knew they were doing the actions in question . . ." *Reconsideration Order* at para. 17. Accordingly, we find no necessity for further prolonging this proceeding with an evidentiary hearing to determine whether Defendant's conduct was intended to ensure compliance with our cross-ownership rules, as they contend, rather than intended to circumvent those rules, as CCI argued.

> In the absence of a *per se* statutory directive, Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, does not automatically require a trial-type hearing. *ITT World Communications, Inc. v. FCC*, 595 F. 2d 897, 900–01 (2d Cir., 1979). When Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j) empowering the Commission to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice", it is clear that the decision of when trial-type hearings are necessary is one which lies within the discretion of the Commission. *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1266 (1974); *West Michigan Telecasters, Inc. v. FCC*, 130 U.S. App. D.C. 39, 42, 396 F.2d 688, 691 (1968). Moreover, our practice with Section 208 complaints has consistently been to resolve the issues on the basis of the written submissions if at all possible.
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> . . . Where, as here, the Commission has been provided with sufficient information upon which to base its decision such that the receipt of additional evidence would serve no useful purpose, a trial-type hearing is not required. *City of Lafayette, La. v. Securities and Exchange Commission*, 454 F.2d 941 (1971), *affirmed, Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973). The evidence submitted was sufficient for us to comprehend the [facts], and all that remained was the need for a Commission interpretation of law based upon the facts submitted.

80 FCC 2d at 289–90.

[21] *See* Answers of Defendants filed November 28, 1983 and their "Joint Opposition to Motion for Orders to Make Answers More Definite and Certain and for an Order Authorizing Pre-Designation Discovery" filed December 28, 1983.

15. Defendants' reliance upon *Chesapeake and Potomac Co.*, FCC 85-48, released January 30, 1985, *recon. denied*, FCC 85-279, released May 30, 1985 ("*C&P*") is equally misplaced. *Reconsideration Order* at para. 14. *C&P* involved proposed tariffed carrier-customer relationships to be covered by an FCC tariff filed by the carrier pursuant to Section 203 of the Act which would govern the business and financial relationships with its customer which were there involved. Such proposal was granted upon a duly-filed application seeking appropriate authority pursuant to Section 214(a) of the Act and our cross-ownership rules. NITCO, on the other hand, has never filed an application under Section 214 of the Act for authority to construct the subject cable television facilities within its telephone operating area. Defendants recognize the need for Section 214 authority when a telephone company constructs cable television facilities for its own direct or indirect benefit. (Petition, at n. 22). Indeed, in at least this one respect, this constitutes an admission on the record that they have violated the Communications Act. In this case, NITCO obviously had an interest in what cable television company or companies could become potential competitors for its telecommunications business. Unlike the telephone company in *C&P, supra*, and *Eagle II, infra*, Defendants here completely ignored the Section 214 filing required under our cross-ownership rules and continue to do so up to this day.

16. Furthermore, we found no merit in NITCO's argument that, under Section 2(b)(2) of the Act, 47 U.S.C. § 152(b)(2), it is merely a "connecting carrier" and therefore not subject to Section 214 of the Act.[22] Nevertheless, telephone companies which are "connecting carriers" with respect to their telephone operations become subject to Section 214 when they construct and operate, directly or indirectly, cable televisioin facilities.[23] Even if, *arguendo*,

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[22] A telephone company engaged in interstate communication *solely* through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such telephone company is a "connecting carrier". Such carriers are exempt from the provisions of, *inter alia*, Section 214 of the Act. *See* 47 U.S.C. §§ 152(b)(2) and 153(u).

[23] Because broadcast television signals do not recognize state boundaries, a cable television system transmitting such signals constitutes part of an interstate "line" within the meaning of Section 214(a) of the Act when constructed by a telephone common carrier subject to our jurisdiction, such as NITCO. *See* General Telephone Co. of the Southwest v. U.S., *supra*, 449 F. 2d at 859, n. 9; Section 214 Authorization, 98 FCC 2d 354 and 356 at n. 3 (1984); *cf.*, General Telephone Company of California, 13 FCC 2d 448, 460-61 (1968), *aff'd*, 413 F. 2d 390, *cert. denied*, 396 U.S. 888 (1969); Dimension Cable TV, Inc., *supra*, 25 FCC 2d at 527-28; Section 214 Certificates, 22 FCC 2d 746, 751 (1970). The

Section 214 were inapplicable in this case, which it is not, Defendants nevertheless are subject to our cross-ownership rules and, *inter alia*, sections 208, 209, 503(b) and 613(b) of the Act. *Reconsideration Order*, at n. 24; *Com Services v. Murraysville Telephone Co.*, FCC 85-553, released October 17, 1985.

17. In light of the foregoing discussion, we conclude that our finding that Defendants were affiliated companies within the meaning of Section 63.54 is supported by substantial evidence and was neither over-broad nor inconsistent with any prior or contemporaneous FCC decision.[24] Defendants have failed to substantiate their contentions to the contrary. On the record before us in this proceeding, we also find no merit in Defendants' further contention that NITCO is not subject to, *inter alia*, Sections 206 and 207 of the Act.[25] We conclude, therefore, that Defendants have shown neither a likekihood of success nor a substantial case on the merits.

Irreparable injury

18. Contrary to Defendants' argument, Northwest Cable is not faced with an either/or choice of selling its facilities or shutting down. The trust arrangement is a viable option to preserve Northwest Cable's rights pending appeal and also maintain the status quo with respect to cable television service to some 1,275 Northwest Cable customers in Hebron and Lakes of the Four Seasons, Indiana who may wish to continue to subscribe to its service, whether or not alternative cable service may be available in those communities.[26] Defendants rely upon our order in *Eagle Telecommunications, Inc.*, FCC 84-191, released May 8, 1984 ("*Eagle II*") where, unlike the instant proceeding, the option of an interim trust arrangement was not considered. In *Eagle II*, we were concerned with whether to stay an order requiring divestiture of cable television facilities constructed without prior authori-

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need for certification pursuant to a Section 214 application is still necessary even in so-called "rural" areas of a telephone company's telephone service area. Eagle Communications, Inc., FCC 85-362, released July 1985, *petition for reconsideration filed* August 19, 1985 ("*Eagle III*") at n. 5.

[24] Defendants' reliance upon Hawaiian Telephone Co., 16 FCC 2d 677 (1986), is unavailing. A limited stay was there granted in light of then pending appeal of fundamental jurisdictional issues determined in our seminal Docket No. 17333 decision.

[25] Under Sections 206 and 207 of the Act, 47 U.S.C. §§ 206 and 207, any common carrier subject to the Act is liable for consequential damages when it violates the Act.

[26] First PIC Acquisition Corporation, CCI's successor-in-interest, is operating a cable television system in Hebron.

zation in violation of our cross-ownership rules by Eagle Telecommunications, Inc. ("ETI"), a telephone common carrier, for its affiliated cable television company. We concluded that, if ETI were ultimately to win on appeal: "it would then be in the position of having to reconstruct facilities and reestablish customer relations. Because of the possibility of other cable television systems commencing operations in the area, it is not clear that ETI would necessarily be able to reestablish its present position . . . ."[27] Accordingly, we concluded tht requiring ETI to divest its cable television facilities entailed "the possibility of irreparable injury to ETI . . . ."[28] We found that a stay of such divestiture requirement would preserve the relative positions of ETI and an independent cable televisoin system already within ETI's proposed cable television service area. We also found a public interest benefit in continued service to customers then receiving cable television service over ETI's facilities. Based on our evaluation of the relative harms to the parties and an analysis of the public interest, we stayed our divestiture order but at the same time reaffirmed that no further construction could be undertaken.[29]

19. We cannot accept Defendants' apparent argument that, because a trust arrangement may also have been possible in *Eagle II* but was not there considered, that somehow precludes us from considering such arrangement here. The interim trust ordered herein is designed to preserve the status quo. In our view, the status quo is maintained by providing a ceiling on the damages resulting from Defendants' anticompetitive behavior should they lose on appeal; providing for full reinstatement of investment and profits should Defendants prevail on the merits; and ensuring continued service to those members of the public currently receiving service form Northwest Cable. The thrust of Defendants' principal objections to a trust arrangement appears to be that no further system construction is contemplated thereunder. However, we note again that in *Eagle II*, upon which defendants rely, we likewise did not permit further construction during the pendency of the stay. Fundamentally, the purpose of a stay, with or without a trust arrangement, is to preserve the status quo; or "the existing state of things at any given date".[30] Clearly, for the Commission to allow further construction pending resolution of the merits of Defendants' appeal would not be preserving "the

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[27] *Eagle II* at para. 9.

[28] *Id.*

[29] *Id.*

[30] Black's Law Dictionary, 1581 (Revised 4th ed. 1968).

existing state of things"; rather it would exacerbate a situation which we already believe to be without legal foundation and would be in contravention of our public interest responsibilities. To the contrary, placing the cable systems which we have ordered divested in the trust arrangement, for which we provide hereinafter, will enable Defendants' interest to be protected *pendente lite*, as well as the interests of the public which we are mandated to preserve.

20. Just as Defendants have not shown that the trust ordered herein places them in the same position in which ETI would have been placed had we denied its stay request, Defendants also have not shown that, without the requested stay, they will be injured irreparably with respect to the forfeiture. It is well established that "mere economic loss", *e.g.*, monetary forfeitures, however substantial, are not enough to establish a showing of irreparable injury where refunds can be made, if appropriate.[31] Defendants have not shown and cannot show that payment of the $20,000 forfeiture penalty, which can be promptly redressed should our orders be reversed by the court, constitutes irreparable injury.

Harm to interested parties

21. Defendants further have failed to show that grant of a stay would not substantially harm other parties interested in this proceeding. Continued operation of Northwest Cable's system in Hebron wihtout having obtained, or even applied for, the requisite authorization – not only violates our cross-ownership rules and the pro-competitive policies underlying those rules and Section 613(b) of the Act – but such operations constitute unfair competition to the detriment of competitors and potential competitors of Northwest Cable and NITCO, particularly First PIC Acquisition Corporation, the successor-in-interest to CCI in Hebron and DeMotte, Indiana. In this respect, this case is distinguishable from the *Eagle Telecommunications* case where, in light of the Cable Act and revised Section 63.58 of our Rules, we authorized the telephone company to engage in cable television·operations within a "rural" portion of its telephone service area.

Public Interest

22. The cross-ownership rules with which we are here concerned were adopted to preclude anticompetitive practices by telephone

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[31] Virginia Petroleum Jobbers Ass'n v. F.P.C., *supra*, 259 F. 2d at 925; Wisconsin Gas Co. v. F.E.R.C., 758 2d (1985); WIYN Radio, Inc., 59 FCC 2d 424 (1976).

companies possessing monopoly power over telephone pole facilities essential to cable television system entrepreneurs. Continuing violations of these rules in flagrant disregard of outstanding Commission decisions and orders, as in this especially egregious case, should not and will not be condoned. Defendants have not shown how the public interest would be harmed by the action taken herein. Indeed, implemenation of the trust order will permit the mulitiple benefits specified in para. 19, *supra.* An alternative cable television system is operational and available to the public in Hebron; Defendants' DeMotte system has not commenced service to the public; and no reason appears why the public's interest in continuing service from the Hebron and the Lakes of the Four Seasons cable systems cannot be adequately protected through a trust. With respect to the $20,000 forfeiture we have ordered, NITCO has not shown in any way how prompt payment would adversely affect the public interest.

23. In view of the foregoing discussion, we disagree with Defendants' contention that *Eagle II* is controlling in this case. All of the facts, circumstances, public interest considerations, and equities involved in the *Eagle Telecommunications* case and in this proceeding are not similar. Unlike ETI, NITCO never has obtained nor even sought the Section 214 authorization required under our cross-ownership rules.[32] ETI ultimately was assessed and timely paid a $20,000 forfeiture for its previous violations of our cross-ownership rules and Section 214 of the Act. On the other hand, Defendants seek to indefinitely stay payment of a similar forfeiture penalty. Furthermore, unlike the *de minimus* injury to the independent cable operator considered in *Eagle II*, (*i.e.*, free service to 8 homes), substantial damages were here sought by CCI because of, *inter alia*, Northwest Cable's unlawful commercial service to almost 1300 cable television subscribers.[33]

24. Our review of the four criteria for granting a stay, as ennumerated in paragraph 9, *supra*, leads us to believe that the most equitable resolution of the instant matters, pending the result of the appeal before the U.S. Court of Appeals, is to require payment of the $20,000 forfeiture while placing operation of the cable company into an interim trust. In this manner, the public

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[32] Because of intervening action of Congress in the Cable Act with respect to the "rural" exception to our cross-ownership rules, we ultimately granted ETI's Section 214 application in *Eagle III*. The rural exemption we there considered is inapplicable in the instant proceeding since it was not requested and no evidence was placed in the record to justify it.

[33] CCI sought in excess of three quarters of a million dollars in consequential damages. *See* NITCO's motion for extension of time, filed May 8, 1985, at n. 4.

interest will be preserved, and anti-competitive behavior will be constrained, while Defendants retain the right to have all assets and profits earned in the event they are successful. While there are some costs associated with operation of the trust itself, they may properly be regarded as normal costs of litigation. The public interest and pro-competitive benefits of such a trust arrangement outweigh such costs in our estimation.[34] No such countervailing factors appear with respect to payment of the $20,000 forfeiture and we therefore order its payment immediately, but subject to the terms of the letter from the Chief, Common Carrier Bureau, to Russell D. Lukas and David L. Nace dated September 24, 1985, permitting the Court of Appeals to rule on Defendants' Emergency Motion for stay.

25. Within seven days of the release of this order, Defendants shall submit a list of at least three potential trustees, in order of preference. The trustee should exhibit integrity, legal ability, knowledge of communications, character, reputation and proximity to the location of Northwest Cable. Further, the potential trustee shall have had no business or personal dealings in the past with Northwest Cable, NITCO, or the Mussman family. As noted elsewhere in this order, Defendants and Bureau staff had met on several occasions in an attempt to work out a mutually acceptable trust agreement (*See* paras. 5 & 6, *supra.*) During the course of those discussions, Defendants were asked more than once to provide the names of possible independent trustees. Thus Defendants should, without much further effort, be able to quickly provide the Bureau with trustee nominees.

Ordering Clauses

26. Accordingly, pursuant to Sections 2, 4(i) and (j), 208, 214(a), 314, 411(a) and 613(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154 (i) and (j), 208, 214(a), 314, 411(a) and 613(b), and Sections 63.01, *et seq*. of the Commission's Rules, 47 C.F.R. §§ 63.01, *et seq.*, IT IS ORDERED, That the "Petition for Stay Pendente Lite" filed jointly by Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc. on September 16, 1985 IS GRANTED to the extent indicated herein and OTHERWISE IS DENIED;

27. IT IS FURTHER ORDERED, That the "Petition for Leave to File Opposition", filed by Comark Cable Fund III d/b/a CCI

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[34] The staff is instructed to work with the trustee and Defendants to assure that all expenses associated with administering the trust are kept to a minimum.

Cablevision on September 26, 1985, IS DISMISSED as moot;

28. IT IS FURTHER ORDERED, That the "Motion for Leave to File Responsive Pleading", filed by Defendants on November 8, 1985, IS GRANTED;

29. IT IS FURTHER ORDERED, That NITCO shall pay the forfeiture ordered in this matter within seven (7) days of the release of this order;

30. IT IS FURTHER ORDERED, That stay of our divestiture orders IS CONDITIONED upon establishment of the Interim Trust specified in the Appendix;

31. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, IS DELEGATED AUTHORITY to approve amendments to the trust conditions in the Appendix should any be found necessary or appropriate to the implementation of our orders in this proceeding;

32. IT IS FURTHER ORDERED, That, within seven (7) days of the release of this Order, Defendants shall file nominations for a trustee of Northwest Cable's assets in accordance with para. 25, *supra*;

33. IT IS FURTHER ORDERED, That the Bureau SHALL cause a copy of this Order to be forwarded by certified mail, return receipt requested, to counsel for NITCO and Northwest Cable;

34. IT IS FURTHER ORDERED, That the effective date of this Order SHALL BE STAYED UNTIL seven (7) days after judicial determination of the request for stay pending before the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

INTERIM TRUST

(1) All assets of whatever kind and stock of Northwest Indiana CATV, Inc. (Northwest Cable or Northwest) shall be placed in a trusteeship. Rhys G. Mussman will retain equitable interest in the assets and stock placed in trust;

(2) A trustee shall be appointed by the Chief, Common Carrier Bureau, to uphold the terms of the trust as provided herein and be compensated therefor in accordance with terms approved by the Common Carrier Bureau. He shall have a fiduciary responsibility to maintain all assets of the company, and to retain all books and records of Northwest. During his term, no compensation, dividends,

interest or payments of any kind whatsoever may be paid to Northwestern Indiana Telephone Company, Inc. (NITCO), its employees, its consultants or any member of the Mussman family except as provided herein; Rhys G. Mussman shall have the right to inspect the company's books during normal business hours upon prior reasonable notice;

(3) The Trustee shall maintain the status quo with respect to operation of the company. In particular, no construction whatsoever of cable television distribution facilities, including the addition of subscribers, shall take place. Also, NITCO shall not construct within its telephone service area facilities intended for or the primary use of which would inure to the benefit of present or future cable television systems without prior Commission authorization;

(4) Without the prior express written approval of the Common Carrier Bureau's Enforcement Division (also referred to hereafter as "the Enforcement Division"), neither NITCO nor any of its employees, consultants, subsidiaries or affiliates will participate directly or indirectly in the operation, maintenance or management of Northwest Cable or any other cable television company operating in NITCO's telephone service area during the term of the trust;

(5) The Trustee shall have the right to borrow sums, compromise and pursue claims, run operations and take any actions deemed appropriate to the conduct of business of Northwest during the term of the trust, including payment of duly tariffed charges properly billed for telephone service rendered by NITCO and other common carriers. He or she shall acquire appropriate indemnification insurance;

(6) All assets and securities of Northwest shall be transferred to the Trustee within seven (7) days of his or her appointment;

(7) In the event that the Commission's orders are reversed on the issue of divestiture by the United States Court of Appeals and, if filed, a petition for a writ of certiorari is not granted, the trust provided for herein shall be terminated within five (5) days of such denial of writ and all assets shall be returned to predecessors-in-interest. If such writ is granted and if the Supreme Court reverses the Commission's decision on the issue of divestiture, the trust will terminate within five (5) days and all assets shall be returned. If the Court of Appeals or the Supreme Court orders a remand of this proceeding without resolving the issue of divestiture, the trust provided for herein shall remain in effect through such further proceedings unless otherwise determined by those forums;

(8) In the event the Commission's orders are upheld by the United States Court of Appeals and, if requested, a petition for writ of certiorari is not granted, the Trustee shall be empowered to sell all assets at market value and shall notify the Commission monthly as to the status of such efforts. If the Trustee has not entered into an agreement for sale within six (6) months of assuming such authority, or if closing does not take place within nine (9) months of such time, the Common Carrier Bureau shall have the right to appoint a successor trustee at any time for the purpose of facilitating sale of the assets;

(9) The Trustee shall, within the first sixty (60) days after taking office, receive appraisals of the going concern value of Northwest. Such valuations shall include all property, including securities, cash balances and other assets and liabilities included in the corpus of the trust. The appraiser selected by the Trustee shall be approved by the Enforcement Division prior to commencing its activities. This appraisal shall constitute the base value of the company for the purposes of this trust. In the event the Orders of the Commission are affirmed in the Federal

Courts and disposition of the assets of the trust occurs, in accordance with the terms set forth in paragraph eight (8) above, the Trustee shall order a final accounting to determine the difference between the base value appraisal and the net value of the corpus at the date of termination of the trust. If the difference in valuation is positive, such difference shall be paid to a charitable institution or institutions after consultation with the Enforcement Division. All remaining assets less expenses required to terminate the trust will be distributed to Rhys Mussman, currently sole equitable shareholder of Northwest, or to his heirs and assigns. In the event there is no difference or the difference is negative, the entire amount, less expenses required to terminate the trust, will be distributed to Rhys Mussman, his heirs and assigns. The trust will be terminated at the completion of the final accounting and distribution as described in paragraph twelve (12), below;

(10) The Trustee shall cause to be prepared opening-day and year-end financial statements consisting of a balance sheet, income statement and sources and applications of funds statement. Such statements will be prepared by a CPA and will be in accordance with generally accepted accounting principles. In addition, quarterly unaudited statements shall be prepared. All such statements shall be maintained in the offices of the Trustee and shall be made available for inspection by the Commission staff on twenty-four (24) hours' notice. All such information shall be held in confidence by the Commission staff and shall not be disclosed to any member of the public, subject to orders of a court of competent jurisdiction or the Commission;

(11) Rhys Mussman shall retain the right to direct the Trustee to sell any or all of the assets of the trust to anyone not part of the Mussman family, employed by NITCO, or otherwise affiliated with NITCO within the meaning of 47 C.F.R. § 63.54 at any time before the United States Court of Appeals or Supreme Court renders a decision. In such an event, the Trustee shall hold all sums received for such assets in escrow pending a final accounting and distribution regarding such assets according to the provisions set forth in paragraph nine (9), above;

(12) All final payouts contemplated under the trust shall be made within sixty (60) days after closing the sale of all assets. Final accounting shall be made, and upon its issuance, the trusteeship will terminate;

(13) The Trustee shall report to the Commission any violation of the above provisions and/or of the Commission's Rules within seven (7) days of discovering such violation(s), and shall serve copies of such reports on counsel for NITCO;

(14) The Common Carrier Bureau is authorized to carry out the responsibilities of the Commission contemplated by this Interim Trust, including amendments thereof, for just cause.

DISSENTING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In re: Comark Cable Fund III

The Commission found on the record before it that defendants NITCO and Northwest Cable have violated its cable-telco cross ownership rules and, on reconsideration, affirmed that finding. *Comark Cable Fund III*, FCC 85-116, ("*March Order*") released March 18, 1985, *recon.*, FCC 85-475, released August 23, 1985.

The Commission gave defendant NITCO six months from the release of the *March Order* to bring itself into compliance with these rules by divesting itself of its cable interests. In response to defendants' motion for stay of the divestiture order, however, my colleagues now propose imposition of a trust arrangement pending the outsome of defendants' appeal of that order.

As a general principle, I do not believe that the Commission should inject itself into the day-to-day operations of a business. There are exceptions to this rule, of course, when resort to a Commission-imposed trustee arrangement are essential to facilitate marketplace transactions. *See, e.g., Evening News Association*, 58 RR 2d 1527 (1985); *Multimedia*, 58 RR 2d 924 (1985). This, however, is not such a case. For this reason, I must dissent to the majority's decisions to impose such an intrusive trustee structure. It is unreasonably burdensome, and, in my view, will not realize our public interest objectives as quickly as possible.

I agree with my colleagues that defendants have also failed to meet three of the four criteria to which the Commission looks in weighing whether to grant a petition for stay of a Commission order. Defendants have shown neither that they are substantially likely to prevail on the merits of their appeal nor that the continued operation of their cable system will not irreparably harm their competitors. *See Memorandum Opinion and Order* at para. 6. The majority also concluded correctly that granting defendants' request would not further the public interest. *See id.* In ordering divestiture, the Commission gave petitioners six months to bring themselves into compliance with its rules. That deferral reflected a reasonable balancing of the public interests promoted by the cross-ownership rules with the public interest in preserving the access of petitioners' current customers to cable services. The public interest will not be served by further delay in enforcement of our original order.

In my opinion, defendants have also failed to show that, without the relief they request, they will be irreparably harmed. The Commission has given defendant NITCO ample time to divest itself of its cable interests. In such a situation defendant cannot claim that divestiture will cause irreparable harm. The Commission has not ordered a fire sale. Defendants do not claim that sale of the system would fail to compensate them fully, not only for their financial investment in the cable systems, but also for the present value of future profits from that business. Nor do they claim that, despite due diligence, they have been unable in the alloted time to find a willing buyer. Finally this is not a case in which the rural exception to the cross-ownership rules has been raised. *Compare Eagle Telecommunications Inc.*, FCC 84-191, released May 8, 1984.

Accordingly, I would deny defendants' request that the divestiture order be stayed. For this reason, I must dissent to the *Memorandum Opinion and Order* to the extent that it does not require defendants to come into compliance with our rules forthwith.

Comparative Criteria

No diversification demerit where applicant made timely and unequivocal pledge to divest in-town ownership interest; applicant may not receive integration credit for limited partner's managerial proposal; overall coverage advantage of 7.5% yields only very slight preference.
—*Cotton B/cing Co.*
MM Docket No. 85-49

FCC 86R-42

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	MM DOCKET NO. 85-49
Grant Cotton, et al., d/b/a COTTON BROADCASTING COMPANY	File No. BPCT-841004KF
THE L BROADCASTING COMPANY	File No. BPCT-841005KR
For Construction Permit for New Television Station at Raleigh, North Carolina	

Appearances

Dennis F. Begley, *Matthew H. McCormick*, and *Christopher G. Wood*, on behalf of Grant Cotton, et al., d/b/a Cotton Broadcasting Company; and *Mark J. Prak* and *James A. Koerner*, on behalf of The L Broadcasting Company.

DECISION

Adopted: June 30, 1986; Released: July 7, 1986.

BY THE REVIEW BOARD: (MARINO CHAIRMAN), JACOBS, AND ESBENSEN.

BOARD MEMBER JACOBS:

1. Only two parties and the standard comparative issue (including comparative engineering coverage) remain in what was originally a five-applicant contest for authority to construct a new television broadcast station on Channel 50 at Raleigh, North Carolina. See Hearing Designation Order, 50 Fed. Reg. 9709, published March 11, 1985. By Initial Decision (I.D.), FCC 86D-16, released March 12, 1986, presiding Deputy Chief Administrative Law Judge James F. Tierney (ALJ) awarded media diversification and ownership integration preferences to The L Broadcasting Company (LBC) under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), and granted LBC's application. Grant Cotton, et al., d/b/a Cotton Broadcasting Company (Cotton) alleges in its exceptions that both preferences were erroneous and that it is the clear comparative winner. Having reviewed the I.D. in light of these exceptions, LBC's limited exceptions, the reply briefs, an oral argument held June 12, 1986, and our examination of the record, we conclude that Cotton is right and summarily reverse the ALJ's decision.

2. *Diversification.* It is well established that a timely and unequivocal media divestiture pledge by a principal will prevent any attribution of those interests to the applicant. *E.g.*, *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 427, 49 RR 2d 606, 610 (1981); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-14, 51 RR 2d 409, 419 (Rev. Bd. 1982), *rev. denied*, FCC 83-368 (Comm'n 1983), *remanded on other grounds*, 753 F.2d 1132 (D.C. Cir. 1985). In the instant case, Cotton's 51% owner and proposed general manager, Grant Cotton, is also president and 70% stockholder of Family Television Corp., licensee of Station WLFL-TV, Raleigh, North Carolina. Although Cotton made a timely and unequivocal divestiture commitment, I.D., para. 10, and the Commission approved the relevant assignment application prior to issuance of the I.D. herein, *Family Television Corp.*, 59 RR 2d 1344 (1986), the ALJ nevertheless held that LBC was entitled to a moderate diversification preference over Cotton, I.D., paras. 62, 77-78, on the grounds that Mr. Cotton's proposed new television station is in the same community as divested Station WLFL-TV and is thus not a "new voice" under *Associated Press* v. *United States*, 326 U.S. 1 (1945). We strongly disagree. This novel result, which would effectively vitiate the significance of Cotton's divestiture commitment merely because his other to-be-divested media interest is located in the same community as the new station, is contrary to specific case precedent, *see, e.g.*, *Vacationland Broadcasting Co., Inc.*, 58 RR 2d 439, 441 (1985) (FM applicant not attributed with ownership of

AM station licensed to same community after timely divestiture commitment), and to a long line of related precedents which give full effect to *all* timely and unequivocal divestiture commitments. *E.g.*, *Klein*, *supra*; *WHW Enterprises, Inc.*, *supra.* The important factor in the instant case is that Cotton will be represented by only a single media voice in Raleigh. The fact that it will be a familiar "new voice," instead of a complete newcomer, is immaterial under existing media diversification policy. *Cf. Vacationland Broadcasting Co., Inc.*, FCC 86-200, released April 29, 1986, para. 11 (applicant's interest in facility it seeks to improve will be totally disregarded for diversification purposes). No diversification preference for LBC is warranted.[1]

3. *Ownership Integration.* Cotton is a general partnership, all three of whose principals — Grant Cotton and his children Kathryn A. Banks and Michael G. Cotton — are proposed as full-time integrated owners at their proposed station. We affirm the ALJ's award of 100% quantitative integration credit to Cotton.[2] On the other hand, LBC's integration proposal is a bizarre North Carolina limited partnership with three general partners, at least one of whom is also a limited partner (Mrs. Evelyn L. Barber). All three general partners will be integrated — indeed, Mrs. Barber is proposed as LBC's full-time business manager (I.D., para. 30) — and Section 6 of their limited partnership agreement provides as follows (Cotton Exh. 6 at 3):

> The General Partners shall have complete and exclusive control over the management of the Partnership business and affairs. The Limited Partners shall have no right to participate in the management or conduct of the Partnership business or affairs nor any power or authority to act for or on behalf of the Partnership in any respect whatsoever.

Although North Carolina limited partnership law appears to permit a person to serve as both a general partner and a limited partner (I.D., para. 25, citing N.C. Stat. ¶ 59-12), the Commission is not bound by State law when applying the Commission's ownership integration policies. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 662–63, 51 RR 2d 383, 387 (Rev. Bd. 1982). And it is quit clear that Commission case law does not allow any ownership integration credit or even a lesser "merit" for limited partners who also participate in the management of a proposed station. *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989, 55 RR 2d 926, 930 (1984). The purpose behind our award of integration credit is to strengthen the bond between legal responsibility and day-to-day management authority. Since limited partners are supposed to be "passive investors [who] have no authority to control the licensee," *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488, 49 RR 2d 1589, 1594 (1981), their integration or lack of integration is inconsequential. *Greater Wichita Telecasting, Inc.*, *supra.*

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[1] We also reject Cotton's request for a slight diversification preference over LBC for the reasons stated by the ALJ in ID, para. 59.

[2] LBC's attacks on the timeliness of the integration commitments of Kathryn Banks and Michael Cotton are without merit. Their November 20, 1984 execution of the Cotton partnership agreement (LBC Exh. 5) came many months before the June 10, 1985 deadline for final integration proposals and satisfies the binding commitment requirement of *Houston Family TV, Ltd.*, 101 FCC 2d 661, 668, 58 RR 2d 1557, 1562 (Rev. Bd. 1985). And the fact that their monetary obligations to the partnership were initially paid by their parents' business does not negate their *bona fides. See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435-36, 55 RR 2d 627, 636-37 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984), *aff'd mem.*, No. 85-1179 (D.C. Cir. Feb. 26, 1986).

4. In the instant case, LBC's partnership agreement (quoted above) is self-contradictory as applied by LBC. On the one hand, it deprives limited partner Mrs. Barber of all managerial authority, while on the other hand it authorizes the same Mrs. Barber to be a general partner with "complete and exclusive" managerial authority! Whether or not such a Janus-like arrangement comports with North Carolina law, it cannot be countenanced for ownership integration credit. We are compelled to take LBC's *limited partnership* agreement at its word and to treat Mrs. Barber as a limited partner for ownership integration purposes. Hence, no credit can be awarded for her general partner activities, and LBC is entitled to no more than 66–2/3% quantitative credit for the cognizable integration of two out of its three general partners. This result conforms with the "legislative history" of LBC's limited partnership agreement, which, from its inception on November 21, 1984 until it was amended on August 29, 1985, two months after the ALJ's June 10, 1985 deadline for final ownership integration statements (Tr. 10), specified Mrs. Barber as LBC's only limited partner. Cotton Exh. 6 at 1. Without such a specification there would have been, by definition, no limited partnership. Therefore, LBC cannot be heard to deny that being a limited partner was Mrs. Barber's quintessential role prior to August 29, 1985. Indeed, subsequent events even further undermine LBC's integration proposal, because the August 29 amendments also conferred limited partner status on LBC's other two general partners. Cotton Exh. 7 at 1–2. Thus, if we gave full weight to these amendments, they would leave LBC with absolutely no cognizable integration credit. However, we need not go so far because even without the amendments Cotton enjoys a

"clear" quantitative integration edge over LBC which cannot be overcome by qualitative enhancements, *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981) (12.5% difference is clear), due to Mrs. Barber's *ab initio* limited partner status. Hence, we will award Cotton a moderate ownership integration preference over LBC without need to consider the parties' qualitative enhancement exceptions. *WHW Enterprises, Inc.*, *supra* (100% credit versus 66-2/3% warrants moderate preference); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 57 RR 2d 440 (Rev. Bd. 1984), *rev. denied*, FCC 85-558 (Comm'n 1985) (enhancement exceptions not addressed).[3]

5. *Comparative Coverage.* The ALJ adopted the views of the Commission's Mass Media Bureau and LBC that neither applicant should receive an engineering coverage preference, even though Cotton will provide television reception to 118,000 more people than LBC (1,697,747 versus 1,579,231), which is a 7.5% advantage. I.D., paras. 47, 73. Cotton challenges this conclusion, urging that it is entitled to a slight comparative preference. Cotton and LBC will be providing new fourth and fifth television services to identical size populations (5,502 and 12,391 people, respectively); however, Cotton's overall service advantage, both in absolute numbers and percentage, is sufficient under established precedents to merit a very slight coverage preference, which we shall award. *See Barton Broadcasting Co.*, 60 RR 2d 322, 326-27 (Rev. Bd. 1986), and cases cited therein.

6. *Motion to Enlarge Issues.* Finally, LBC excepts to the ALJ's Memorandum Opinion and Order, FCC 85M-4653, released November 25, 1985, in which he declined to add financial, misrepresentation, and violation of sequestration order issues against Cotton. We agree with the ALJ that LBC failed to establish a *prima facie* case warranting further inquiry. *See Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1097, 50 RR 2d 1251, 1257 (Rev. Bd. 1982), *rev. dismissed*, FCC 83I-129, released November 9, 1983. Cotton adequately documented its financial qualifications

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[3] Under the circumstances, we need not reach Cotton's exceptions which challenge the overall *bona fides* of LBC's limited partnership agreement because of pre-amendment provisions effectively giving the then sole limited partner (Mrs. Barber) exclusive power to remove the general partners with or without cause and to amend the partnerhsip agreement unilaterally. Clearly the limited partnership ownership device blew up in LBC's face because of inept use. However, like an errant Fourth of July reveler burned by a firecracker, LBC must be charged with the consequences of its actions in light of five years of cautionary Commission precedent. *E.g.*, *Anax*, *supra* (1981); *Greater Wichita*, *supra* (1984); and *KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288, 58 RR 2d 1483 (Comm'n 1985).

in response to LBC's motion and cannot be held to have violated a sequestration order when the ALJ did not issue any such order or otherwise pass on the mechanics of sequestration during the pre-hearing desposition sessions involved. Nor has it been alleged that the sequestration-related matters yielded admissible evidence that was an abuse of discretion for the ALJ to consider. *See United States* v. *Johnson*, 578 F.2d 1352 (10th Cir. 1978) (circumvention of incomplete sequestration order not penalized, especially where no abuse of discretion shown in reception of evidence).

7. *Final Comparative Evaluation*. All decisionally significant exceptions have been considered by the Board. Cotton has been awarded a moderate ownership integration preference and a very slight comparative coverage preference, while LBC has received no preferences. Hence, under the *Policy Station, supra*, Cotton is the clear winner, and we conclude that grant of its application will best serve the public interest, convenience, and necessity.

8. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by Grant Cotton, et al., d/b/a Cotton Broadcasting Company on April 24, 1986 IS GRANTED, and its amendment IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the application of Grant Cotton, et al., d/b/a Cotton Broadcasting Company (File No. BPCT-841004KF) for a construction permit to establish a new television broadcast station at Raleigh, North Caroline IS GRANTED, and the application of The L Broadcasting Company (File No. BPCT-841005KR) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 86D-16

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	MM Docket No. 85-49
Grant Cotton, et al., d/b/a COTTON BROADCASTING COMPANY	File No. BPCT-841004KF
THE L BROADCASTING COMPANY	File No. BPCT-841005KR
For Constructionn Permit for New Television Station Raleigh, North Carolina	

Appearances

Dennis F. Begley and *Matthew H. McCormick, Esqs.*, (Reddy, Begley & Martin) on behalf of Grant Cotton, et al. d/b/a Cotton Broadcasting Company; *Mark J. Prak, Esq.* (Tharrington, Smith & Hargrove) on behalf of The L Broadcasting Company; and *Norman Goldstein, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: March 5, 1986; Released: March 12, 1986

Preliminary Statement

1. At the outset this case concerned the mutually-exclusive applications of Charles Ray Shinn (Shinn), Grant Cotton, et al., d/b/a Cotton Broadcasting Company (CBC), The L Broadcasting Company (LBC), Howard N. Lee and Henry Middleton, d/b/a Raleigh Community Broadcasting Co., Ltd. (RCB) and P. Michael Shanley and Josie Montgomery, d/b/a Brahman Communications (Brahman) for authority to construct a new commercial television

station to operate on Channel 50 at Raleigh, North Carolina.

2. The applications were designated for hearing by *Hearing Designation Order (HDO)*, 50 Fed. Reg. 9709 (released March 8, 1985, published March 11, 1985). The following issues were designated:

a. To determine with respect to L Broadcasting Company, Raleigh Community Broadcasting and Brahman Communications, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

b. To determine with respect to Charles Ray Shinn, whether the proposal is consistent with Section 73.610 of the Commission's Rules, and if not, whether circumstances exist which would warrant a waiver of the Rule.

c. To determine which of the proposals would, on a comparative basis, best serve the public interest.

d. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The HDO directed that a comparison of the appicants' coverage proposals be made under the standard comparative issue (HDO ¶ 4).

3. The air hazard issue designated against LBC was resolved in its favor by summary decision in *Memorandum Opinion and Order*, FCC 85M-2143 (released May 16, 1985).

4. By *Memorandum Opinion and Order*, FCC 85M-3874, (released October 3, 1985), the applications of Shinn and Brahman were dismissed with prejudice pursuant to the approval of settlement agreements with RCB. On October 11, 1985, RCB filed a Motion to Dismiss its application. By *Order*, FCC 85M-4046, (released October 17, 1985), the Motion was granted and RCB's application was dismissed with prejudice. As a result of these actions, only Issues 3 and 4 remain.

5. The prehearing conference was held on May 10, 1985, *Order*, FCC 85M-1017 (released March 13, 1985). Hearing sessions were held in Washington, D.C. on September 24 and September 25, 1985.

6. The "B" cut-off date in this proceeding was November 23, 1984. Public Notice, Report No. B-94 (released October 13, 1984). Pursuant to the Presiding Judge's directive, integration statements were filed June 10, 1985 (Tr. 9-10).

7. Timely proposed Findings of Fact and Conclusions of Law and Reply Findings were filed by surviving parties applicant on January 3, 1986 and January 24, 1986, respectively. Because proposed findings and conclusions are customarily directed from

the private parties and invited from the Chief, Mass Media Bureau, to the extent those submission faithfully reflect the evidence of record, they not only conserve time and resources, but greatly aid in the responsibility of the trier-of-fact to expedite early resolution of the case (See Rule 1.263; 47 CFR 1.263).

8. For the reasons hereinafter set forth, this, as an Initial Decision SHALL GRANT the application of The L Broadcasting Company.

Findings of Fact

A. Cotton Broadcasting Company

Ownership and Organization,

9. CBC is a general partnership composed of the following partners:

Name	*Partnership Interest*
Grant Cotton	51.0%
Kathryn A. Banks	24.5%
Michael G. Cotton	25.5%

(CBC Ex.1; Tr. 57-58, 117-18, 133).

Other Media Interests

10. Grant Cotton is President, a Director and 70.199% stockholder of Family Television Corp., the licensee of WLFL-TV, Raleigh, North Carolina. Grant Cotton, Kathryn A. Banks and Michael G. Cotton are all employees of WLFL-TV. However, all of CBC's principals have made a timely pledge to divest all of their interests in, and sever all connections with, Station WLFL-TV prior to commencement of program tests in the events CBC's application is granted (CBC Ex. 2; CBC Ex. 3, p. 1; CBC Ex. 4, p. 1; CBC Ex. 5, p. 1; Tr. 99, 120, 138). Each partner in CBC has no employment contract with Family that would inhibit or restrict his or her ability to leave WLFL-TV (Tr. 99, 120-21, 138). Neither CBC nor any of its principals has any interest in, or connection with, any other broadcast station, or any newspaper, cable television system or other media of mass communications (CBC Ex. 2; CBC Ex. 3, p. 1; CBC Ex. 4, p. 1; CBC Ex. 5, p. 1).

Integration of Ownership and Management

11. *Grant Cotton.* Grant Cotton proposes to serve as full-time General Manager of CBC's station, working at least 9:00 a.m. to

5:30 p.m., Monday through Friday, a minimum of 40 hours per week. Cotton plans to devote additional time as required to accomplish the goals of the station. As General Manager he will supervise the station's overall operations, and have primary responsibility for the station's financial management, its compliance with FCC operational regulations, and the training and supervision of management level personnel. Grant Cotton will work closely with Michael Cotton, the station's proposed Program Director, to ascertain the programming needs of the station's service area and to develop programming to address those needs, and with Kathryn Banks, the station's proposed Public Affairs Director, to encourage community involvement in public affairs programming (CBC Ex. 3, p. 2).

12. Grant Cotton was born in North Carolina and has lived in Durham, North Carolina, which is within the service area of CBC's proposed station, since 1962. He plans to continue residing in Durham should CBC's application be granted (CBC Ex. 3, p. 1; Tr. 86–87).

13. Together with his wife, Grant Cotton owns the Econo Lodge Motel in Durham, North Carolina, the Overnight Inn in Elizabeth City, North Carolina and Grant Cotton Realty in Durham, North Carolina (CBC Ex. 3, p. 2; Tr. 87–89). The Cottons employ a General Manager to look after both motels and the realty business (Tr. 89). Mr. Cotton himself devotes a total of approximately five hours per week to these businesses (CBC Ex. 3, p. 2).

14. Since 1981, Grant Cotton has been the full-time General Manager of Station WLFL-TV, Raleigh, North Carolina. As General Manger, Cotton is responsible for the entire operation of the station (CBC Ex. 3, p. 2; Tr. 81). As previously noted, Grant Cotton has made a timely pledge that, prior to the commencement of program tests by the proposed station, he will sever all connections with WLFL-TV (CBC Ex. 3, p. 1).

15. Grant Cotton has participated in civic activities in the proposed service area but not in Raleigh, the proposed city of license. From 1963 to 1967, Cotton was a member and attended meetings of the Exchange Club, a civic club located in Durham (CBC Ex. 3, p. 3; Tr. 91–92). From 1982 to 1984, Grant Cotton was a member of the Durham Chamber of Commerce (CBC Ex. 3, p. 3 Tr. 92–93) and was also a member of Northgate Chapel Church in Durham, from 1972 to 1984 (CBC Ex. 3, p. 3; Tr. 93–94). Cotton currently attends the Homestead Height Baptist

Church, which is also in Durham (Tr. 101; CBC Ex. 5, p. 2).

16. *Michael G. Cotton.* Michael Cotton proposes to serve as the full-time Program Director of CBC's station, working at least 8:30 a.m. to 5:00 p.m., Monday through Friday, a minimum of 40 hours per week. He would devote additional time as necessary to accomplish the programming objectives of the station. As Program Director he will be responsible for planning and implementing the day-to-day programming of the station. This will include overseeing the station's production staff and facilities; negotiating and purchasing syndicated programming for the station; developing and implementing financial budgets for the programming department; coordinating with other management level personnel to ensure the station's programming efforts are effectively performed; and ensuring the station's programming complies with FCC regulations (CBC Ex. 4, pp. 1–2).

17. Michael Cotton has been a resident of the proposed service area since 1962. He currently resides in Durham, North Carolina but if CBC's application is granted, he will become a resident of Raleigh (CBC Ex. 4, p. 1.; Tr. 105, 108–10).

18. Michael Cotton has been employed by Station WLFL-TV since 1982. He has held positions at the station in the areas of programming, production, traffic, billing and accounting. Since April 1984, he has been the station's Program Director (CBC Ex. 4, p. 1; Tr. 105, 108–10).

19. Michael Cotton has been employed by Station WLFL-TV since 1982. He has held positions at the station in the areas of programming, production, traffic, billing and accounting. Since April 1984, he has been the station's Program Director (CBC Ex. 4, p. 2). Michael Cotton has made a timely pledge to terminate his employment with WLFL-TV and sever all connections with the station prior to the commencement of program tests for CBC's proposed station (CBC Ex. 4, p 1; Tr. 114).

20. *Kathryn Banks.* Kathryn Banks proposes to serve as the full-time Public Affairs Director of CBC's station, working at least 8:30 a.m. to 5:00 p.m., Monday through Friday, a minimum of 40 hours per week. She will devote additional time as needed to meet the stations' public affairs goals. As Public Affairs Director she will be responsible for planning and producing the station's public affairs and news programming; determining the topics to be covered or discussed during the shows; contracting community leaders to serve as guests; supervising the staff of the public affairs department; developing and implementing financial budgets for the department; and coordinating programming and staff

requirements with other management-level personnel.

21. Banks has been a resident of the proposed service area since 1962. She currently resides in Durham but, in the event the application of CBC is granted, she will become a resident of Raleigh (CBC Ex. 5, p. 1; Tr. 131). Ms. Banks' husband already works in Raleigh (Tr. 131).

22. Banks also has been involved in civic activities in the proposed service area but as with the other CBC principals not in Raleigh. Since May 1985, she has been a member of Homestead Heights Baptist Church in Durham. When in high school, approximately five years ago, she was involved in the Sertoma Club in Durham, a high school organizatioon involved in many civic activities including the Special Olympics (CBC Ex. 5, p. 2; Tr. 132–33). The Sertoma Club is basically a women's group that is comparable to the Jaycees for men (Tr. 133).

23. Banks currently works as a Sales Assistant for WLFL-TV. She has been employed by the station since 1981 (CBC Ex. 5, p. 2). Banks has made a timely pledge that, prior to commencement of program tests by the proposed station, she will terminate her employment with WLFL-TV and sever all connections with the station (CBC Ex. 5, p. 1).

B. The L Broadcasting Company

Ownership and Organization

24. The L Broadcasting Company is a North Carolina limited partnership. LBC is legally empowered to construct and operate the proposed television station. The responsibility for the management of LBC's affairs is vested in three general partners. Under the terms of LBC's Limited Partnership Agreement, the general partners have complete and exclusive control over the management of the partnership's business and affairs. Frederick R. Barber, Jr., Evelyn R. Barber and Eleanor J. Brown are LBC's general partners. LBC consists of three general partners and three limited partners. The interest of the partners and equity of the partnership are as follows:

General Partner	Present *Equity Interest*	"B" Cut-Off *Equity Interest*
Frederick R. Barber, Jr.	10%	10%
Evelyn L. Brown	10%	10%
Eleanor J. Brown	10%	10%
Limited Partners		
Frederick R. Barber, Jr.	23.33%	0%
Evelyn L. Barber	23.33%	70%

Eleanor J. Brown	23.34%	0%

(LBC Exhibit 1, CBC, Exhibits 6 and 7).

25. North Carolina has adopted the Uniform Limited Partnership Act. Thus, under North Carolina limited partnership law, a person may serve as both a general partner and as a limited partner in a limited partnership (N.C. Stat. ¶ 59-12). LBC has at all relevant times herein consisted of three general partners, Fred Barber, Evelyn Barber and Eleanor Brown. Subsequent to the "B" cut-off date[1] and the depositions of its three principals in August of 1985, the LBC Limited Partnership Agreement was amended to make all three general partners limited partners also (CBC, Exs. 6 and 7). The principal reason LBC was formed as a limited partnership was to provide it with flexibility in financing the construction and operation of the station if it was awarded the grant (Tr. 210, Tr. 242, 243, Tr. 330 and Tr. 358). If LBC is awarded the grant it would have the option, if the three general partners so choose, of raising additional capital through the sale of limited partnership shares (Tr. 210, Tr. 330 and Tr. 358; CBC Exs. 6 and 7). Such a possible future sale of limited partnership shares could be by the limited partners directly or indirectly or by dilution of their limited partnership interests (CBC Exs. 6 and 7; N.C. Gen. Stat. ¶ 59-8). LBC will not be required to sell additional limited partnership shares to other investors because it is otherwise financially qualified (Tr. 210-212, T-330, T-358, 369-370). The limited partnership vehicle provides LBC the option of raising equity in this fashion should it be awarded the grant and choose to do so.

26. LBC was organized for the purpose of seeking the television construction permit in this proceeding. LBC has no interest in any other media of mass communication (Ex. 1).

27. LBC General Partner, Frederick R. Barber, Jr., is employed as Vice-President of WTAE Division—The Hearst Corporation and General Manager of Television Station WTAE-TV, Pittsburgh, Pennsylvania. Mr. Barber will resign these positions if LBC is awarded the construction permit for the Raleigh television station. LBC General Partner, Eleanor J. Brown, is employed as Director of Personnel of the Broadcasting Group of Gannett Company, Inc. (Gannett). Ms. Brown will resign from her present employment if LBC is awarded the construction permit. She has

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[1] The "B" cut-off date in the proceeding was November 23, 1984. FCC Mimeo 0333, Report No. B-94.

intended to resign her employment from the inception of her involvement with LBC (Tr. 371–373). Gannett operates six television and sixteen radio stations in the United States. None of these stations is located in North Carolina (Tr. 351). Other than their interest in LBC and those set out here, the general and limited partners of LBC have no other interest in any medium of mass communication (LBC Exs. 1, 2, 3 and 4).

Integration of Ownership and Management

28. Frederick R. Barber, Jr., will serve as LBC's full-time General Manager. Mr. Barber will devote 40 hours or more per week to his duties as General Manager. Mr. Barber's duties will include overall responsibility for the administration and operation of the television station. The following management employees will report directly to him: (1) Station Manager, Eleanor J. Brown; (2) Business Manager, Evelyn L. Barber; and (3) a General Sales Manager, who has yet to be determined (LBC, Exs. 1–4).

29. Eleanor J. Brown will serve as LBC's full-time Station Manager. Ms. Brown will devote 40 hours or more per week to her duties as Station Manager. Ms. Brown's duties will include overall supervisory responsibility for the following departments: Programming, Promotion, Engineering and Personnel. Ms. Brown will also be responsible for the supervision of the station's public affairs programming and the implementation of the company's EEO program (LBC Exs. 1 and 4).

30. Evelyn L. Barber will serve as the full-time Business Manager of the proposed station. Ms. Barber will devote 40 hours or more per week to her duties as Business Manager. Ms. Barber's duties will include overall supervisory responsibility for all financial operations of the station, including financial planning, purchasing, collections, marketing and other business matters (LBC Ex. 1 and 3). Ms. Barber will be responsible for LBC's cash management (Tr. 340).

31. Frederick R. Barber, Jr., was born in Crossnore, North Carolina on October 17, 1937. He has lived in a number of locations throughout North Carolina. He was educated in the public schools in North Carolina and graduated from High Point College in High Point, North Carolina in 1959 with a B.A. in English. Mr. Barber presently resides in Pittsburgh, Pennsylvania. Prior to living in Pittsburgh, he resided in Atlanta, Georgia; Raleigh, North Carolina; Washington, D.C., and various locations throughout North Carolina. For approximately four years, from

1976 through 1980 he lived in Raleigh, North Carolina. If LBC is awarded the construction permit, Mr. Barber will make his residence in Raleigh, North Carolina. Mr. Barber presently owns a home in Raleigh, North Carolina (LBC Ex. 2 and Tr. 201).

32. Mr. Barber has spent nearly his entire working career employed in the broadcast industry. He has worked at television stations for approximately 25 years, with 21 of those years spent in management positions. After graduating from college, Mr. Barber worked as a reporter for the High Point Enterprise, a daily newspaper in High Point, North Carolina. In 1960 he joined WSOC-TV in Charlotte, North Carolina as a reporter-photographer. Among other things, he covered the civil rights movement in the South for WSOC-TV and for NBC News. His stories were frequently broadcast on NBC's nightly news program "The Huntley Brinkley Report." He was later promoted to the position of News Producer and when he left WSOC-TV in 1963, held the position of Assistant News Director. In 1963, he accepted employment as News Director with WGHP-TV in High Point, North Carolina, when that station first signed on the air. He was later promoted to the position of Program Manager and Promotions Manager. After a brief tenure with WLOS-TV in Asheville, North Carolina as Program Operations Manager, Mr. Barber joined WBTV(TV) in Charlotte, North Carolina as Broadcast Operations Manager in 1969. His responsibilities included supervision of the sales, news, programming, promotion, production and engineering departments. In 1976, Mr. Barber accepted a position as General Manager of Television Station WRAL-TV in Raleigh, North Carolina. He was later elected to the position of Vice-President, Director and Member of the Executive Committee of Capitol Broadcasting Company, Inc., the licensee of WRAL-TV. In 1980, Mr. Barber accepted a position as General Manager of WSB-TV in Atlanta, Georgia. He was also elected a Vice-President of Cox Communications, Inc., the licensee of WSB-TV (LBC Ex. 2).

33. During his career in broadcasting, Mr. Barber has been active in broadcast industry affairs. He has served on the Board of Governors at the ABC Television Affiliates Association. In addition, he has served as Secretary, Vice Chairman and Chairman of the Board in that organization. He also served for two years as Chairman of the ABC Television Affiliates Association's

Economic Study Committee (LBC Ex. 2).

34. Mr. Barber has served as a member of the Board of Directors and Vice-President for Television of the North Carolina Association of Broadcasters and as a Director and Vice-Chairman of the Board of Governors for the Washington Chapter of the National Academy of Television Arts and Sciences. He has also served as an alternate Trustee and as a Trustee for the National Academy of Television Arts and Sciences (LBC Ex. 2).

35. Mr. Barber is presently or has been in the past involved in the following civic activities and community affairs in various communities where he has lived:

Member, Board of Directors, Lung Association (Raleigh, Atlanta)

Member, Board of Directors, Leukemia Society (Atlanta)

Member, Board of Directors, Salvation Army (High Point)

Member, Board of Directors, Salvation Army Boys Club (High Point)

Member, Board of Directors, Goodwill Industries (High Point)

Member, Board of Directors, Better Business Bureau (High Point, Raleigh, Atlanta)

Section Chairman and Division Chairman for Member, Advisory Board, Clark College School of Communications (Atlanta)

Member, Edenton Street United Methodist Church, Sunday School Teacher, Member of the official board of the Church (Raleigh)

Member, First Presbyterian Church, served on Communications Committee and Church Shelter Committee (Atlanta)

Cerebral Palsy Fundraising Volunteer (Raleigh, Atlanta, Pittsburgh)

Member, Board of Directors, Epilepsy Foundation (Charlotte)

(LBC Ex. 2, Tr. 202).

36. During the period from 1976 to 1980, Mr. Barber was involved in the organization of the North Carolina Chapter of Partners, Inc., a Denver based organization which attempts to work with youthful criminal offenders to help them turn their lives around. Mr. Barber served as Chairman of the North Carolina Chapter of Parnters, Inc.'s Board of Directors and also as a Member of the National Board of Directors of Partners, Inc. He also headed up the Walker County Chapter of Partner's fundraising efforts prior to becoming Chairman when he lived in Raleigh (LBC Ex. 2).

37. Evelyn L. Barber was born in Randolph County, North Carolina on October 3, 1937. She presently resides with her husband, Frederick R. Barber, Jr., in Pittsburgh, Pennsylvania. Prior to living in Pittsburgh, she resided in Atlanta, Georgia, Washington, D.C., Charlotte, Asheville, High Point, Concord, Statesville and Raleigh, North Carolina. Mrs. Barber grew up in Randolph County, North Carolina and attended college at Pfeiffer College in Misenheimer, North Carolina where she graduated with a B.A. degree in 1959. Her major in college was Christian Education with minors in Business and Psychology (LBC Ex. 3).

38. For approximately four years, from 1976 to 1980, she lived in Raleigh, North Carolina. If LBC is awarded the construction permit, Mrs. Barber will make her residence in Raleigh, North Carolina where she and her husband currently own a home (LBC Ex. 3 Tr. 316, Tr. 339).

39. From 1960 to 1972, Mrs. Barber was employed at various times as Personnel and Safety Administrative Assistant for Sealtest Foods in Charlotte, North Carolina; as a bookkeeper with Heritage Printers in Charlotte, North Carolina; and as an Administrative Assistant with E.B. Stone Finance Company in Charlotte, North Carolina. From 1973 to 1976, she served as a residential real estate Sales Agent with Bogley Real Estate in Bethesda, Maryland and Washington, D.C. From 1977 to 1980, she served as a Sales Representative for Olsten Temporary Services in Raleigh, North Carolina. From 1981 to the present, she has been employed as a consultant with Xerox Learning Systems (now Learning International) in Atlanta, Georgia and Pittsburgh, Pennsylvania. She has conducted training seminars in the areas of management, sales and customer service for a variety of industries, including, but not limited to, broadcasting, banking, textiles, communications and health care (LBC Ex. 3, Tr. 316).

40. Mrs. Barber claims that she is presently or has been in the past involved in the following civic and community activities:

Neighborhood Chairperson and volunteer fundraiser for American Cancer Society (Raleigh)

Neighborhood Chairperson and volunteer fundraiser for American Heart Association (Raleigh)

Volunteer fundraiser for Cystic Fibrosis

Volunteer fundraiser for Muscular Dystrophy

Neighborhood Chairperson and Volunteer fundraiser for the March of Dimes

Volunteer fundraising participant in the Wake County Chapter of Partners, Inc. (Raleigh)

Member, Fledgling Foundation (Atlanta)

Volunteer/Trainer, United Way (Atlanta)

Member and fundraising volunteer, High Museum Guild (Atlanta)

Voluntary tutor in public schools (Raleigh)

Participant in Shut-In Friends Program (Washington, D.C.)

Member and Church School Teacher, Edenton Street United Methodist Church (Raleigh)

Member, First Presbyterian Church and Church Shelter (Atlanta)

Member, North Carolina Museum of Art (Raleigh)

(LBC Ex. 3).

In the "past" is not set forth as to period or years of civic activity and certain claimed activities, not otherwise fully defined, appear not to be in the proposed service area, e.g., Atlanta or in connection with the local residence.

41. Eleanor J. Brown was born in New York City on September 16, 1942. If LBC is awarded the construction permit, she will make her residence in Raleigh, North Carolina. Ms. Brown is a female Black American (LBC Ex. 4).

42. Ms. Brown has spent approximately the last 13 years of her working career employed with companies that operate, among other things, television and radio stations. From March 1972 to 1978, Ms. Brown was employed as Manager of Personnel for The Evening Star Broacasting Company in Washington, D.C. Her duties included training and development department heads for the following broadcast properties: Radio Station WMAL-AM and Television Station WMAL-TV, Washington, D.C.; Television Station WCIV-TV, Charleston, South Carolina and Radio Station WLVA(AM), Lynchburg, Virginia. Subsequently, she was employed as Manager of Personnel and Assistant to the President and General Manager of Albritton Communications, Inc., licensee of Television Station WJLA-TV, Washington, D.C. when Albritton purchased the station from *The Evening Star* (LBC Ex. 4).

43. From March 1979 to March 1980, she was employed as Director of Personnel Development for Westinghouse Broadcasting Company in New York City. Westinghouse operated a number of television and radio stations at that time. From April of 1980

to March of 1985, Ms. Brown was employed by Cox Communications, Inc. as Director of Personnel for Radio Station WSB-AM and FM and Television Station WSB-TV in Atlanta, Georgia. From April 1985 to the present, she has been employed by Gannett Company, Inc. as Director of Personnel for the Broadcast Group. She is presently responsible or developing department heads for 16 radio stations and 6 television stations owned and operated by Gannett. Her current position is a management position (Tr. 352).

44. Ms. Brown claims she is presently, or has been in the past, involved in the following civic actitivies. In the "past" is not set forth specifically as to periods of activity and now appear to be civic activities in the proposed service area or are otherwise associated with local residence background.

Member, Board of Directors, American Women in Radio and Television

Member, Board of Directors, American Women in Radio and Television

Member, Board of Directors, Fledglings, Inc. (Atlanta)

Member, Board of Directors, Atlanta Easter Seals Society

Member, National Association for the Advancement of Colored People

Chairperson, Clark College Broadcast Advisory Board (Atlanta)

Visiting Professor, Broadcast Management, Department of Communications, Atlanta University Center

Volunteer Instructor for the Atlanta Urban League Clerical and Training Program

Member, Retarded Citizens Agency

Volunteer, Youth Development Program (Washington, D.C., Atlanta)

(LBC Ex. 4).

C. Areas and Populations to be Served.

45. The HDO also directed that the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade "B" or greater intensity in such areas to be considered under the standard comparative issue. The Mass Media Bureau's participation in the proceeding proposed findings of fact and conclusions of law is limited to this comparative coverage matter, and thus, filed

proposed findings on that subject.

46. The surviving applicants for a new television station construction permit on Channel 50, Raleigh, North Carolina, are: Grant Cotton, et al., d/b/a Cotton Broadcasting Company and The L Broadcasting Company. The following data regarding their proposed coverage are derived from the joint engineering exhibit submitted as Joint Exhibit 1.

Comparison of Coverage

47. The following are the total areas and populations which the applicants will cover within their respective Grade "B" contours:

Applicant	*Area (Sq. mi.)*	*Population*
CBC	11,155	1,697,747
LBC	10,324	1,579,231

Other Available Service

48. The following are total areas and populations receiving other services within the uncommon service areas for LBC:

Other Services	*Population*	*Area (Sq. mi.)*
3	5,502	157
4	12,391	187
5	17,938	127

The same figures for CBC are as follows:

Other Services	*Population*	*Area (Sq. mi.)*
3	5,502	157
4	12,391	187
5	18,213	132

Ultimate Findings and Conclusions

49. Well established is the fundamental thesis that a comparative choice between two applicants for a new broadcast construction permit is grounded in two primary objectives: maximum diffusion of control of the media of mass communications and provision of the best practicable service to the public. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The applications of LBC and CBC must meet the test of that thesis and its objectives.

Diversification of Ownership of the Media of Mass Communication

50. Neither CBC nor LBC appear to own or have any cognizable interests in any media of mass communication. Two of LBC's principals are employed by corporations which operate broadcast

businesses. Neither has any ownership interest in the companies. The three of CBC principals are employed by WLFL-TV, Raleigh, North Carolina. N. Grant Cotton, CBC's controlling general partner, is President, Director and 70.199% owner of WLFL-TV, Raleigh, North Carolina.

51. LBC's Frederick R. Barber, Jr. is currently employed as Vice-President of the WTAE Division of the Hearst Corporation and General Manager of Television Station WTAE(TV), Pittsburgh, Pennsylvania. Barber assumed this position in June 1985 subsequent to the "B" cut-off date in the instant proceeding.[2] He reported his taking this new position to the Commission timely and indicated his intention to leave his position with WTAE-TV in the event LBC's application was granted. LBC's Eleanor J. Brown accepted employment with Gannett as Director of Personnel for the Broadcast Group subsequent to the "B" cut-off date in this proceeding. She made a timely report of her acceptance of this new job. She has intended from the beginning of her involvement with LBC to resign her employment if LBC is granted the construction permit.

52. As noted above, all of CBC's principals are employed by Television Station WLFL-TV, Raleigh, North Carolina. In the event CBC's application is granted, they will resign their current employment with WLFL-TV.

53. LBC argues that N. Grant Cotton's divestiture pledge, must be assessed a comparative demerit because he as controlling partner already owns a UHF television station licensed to Raleigh, North Carolina operating on Channel 22; that he already possesses what he claims to seek! The filing of an applicationn for a new UHF television station on a higher channel (here Channel 50) by one who already owns such a station is, on its face, contrary to the diversification principle, citing *Associated Press* v. *United States*, 326 U.S. 1, 20; further that Grant Cotton has, by virtue of this application filing and "divestiture stratagem," been able to "bootstrap control" over two television allotments in the same city, Raleigh, North Carolina, since October of 1984; that finally, in view of N. Grant Cotton's ownership and control of Television Station WLFL-TV, Raleigh, North Carolina, Cotton must be assessed a substantial comparative demerit, citing

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[2] The "B" cut-off date in this proceeding was November 23, 1984. FCC Mimeo 0333, Report No. B-94.

Southern Keswick, Inc., 34 FCC 2d 624 (1972).

54. Not so states CBC in its Reply noting that "[t]his argument is as meritless as LBC's theory on timely divestiture pledges." In *Keswick* the Commission had before it three applications, including one from Southern Keswick, Inc., the licensee of noncommercial Station WGNV(FM), St. Petersburg, Florida. Station WGNV, however, was operating on a commercial frequency. Keswick filed an application for a new noncommercial educational FM station to operate on Channel 203, a noncommercial frequency. Keswick also filed an application for consent to assign its license for operation on Channel 268 to Semit Corporation, a subsidiary of Times Publishing Company, publishers of St. Petersburg's only daily newspaper. Keswick and Semit insisted on prosecution of both applications. Following an arduous path, which required it to distinguish at least four cases, the Commission determined that the Keswick application to operate on Channel 203 in fact was a request for modification of Station WGNV and, when construed as a request for modification of facilities, that application was inconsistent with the application to assign WGNV to Semit. It then dismissed both applications without prejudice. Unlike the situation in *Keswick*, where the construction permit applicant was the licensee of a station in the same service in the same community, Family Television Corp. (the licensee of WLFL-TV) and CBC are not the same. One is not a subsidiary or alter ego of the other. They are separate and distinct entities with different interests and objectives. In summary, CBC argues that LBC's request that CBC be awarded a diversification demerit on those grounds should be summarily rejected.

55. Finally, CBC states it is LBC which, through the filing of a petition to deny, is delaying approval of an application for assignment of WLFL-TV which will allow Grant Cotton to divest his ownership interest in that station. "Moreover, even if *no steps* had been taken toward divestiture of WLFL-TV, Mr. Cotton's divestiture pledge is fully creditable," citing *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 488, 55 RR 2d 1299, 1302 (Rev. Bd. 1984), *aff'd.*, 58 RR 2d 439 (1985).

56. CBC further argues that LBC must be attributed with the significant managerial interests of Frederick Barber and Eleanor Brown, saying that neither of whom made timely divestiture pledges as to those positions. Although Ms. Brown testified at hearing that she intended from the time she joined LBC to resign her Gannett position, the fact is she did not timely inform the Commission and the other parties as to that alleged plan. Her

failure to do so makes that managerial interest fully attributable. *Northland Communications*, 100 FCC 2d 914, 919, 58 RR 2d 825, 828 (Rev. Bd. 1985) (integrated principal of applicant should have explicitly stated by the "B" cut-off date his intention to leave a managerial position as Vice President and General Manager of an existing AM/FM combination in order to avoid diversification consequences). Thus, CBC concludes it must be awarded a slight diversification preference over LBC.

57. Again, CBC would have it that its three principals have made timely pledges "(i.e. as of the "B" cut-off date)" to divest all of their interests in and sever all connection with Station WLFL-TV prior to commencement of program tests in the event the CBC application is granted; that no CBC partner has any employment contract with Family Television which would inhibit in any way his or her ability to leave WLFL-TV; that, consequently, their divestiture pledges should be fully credited, citing *Morris, Pierce & Pierce*, 88 FCC 2d 713, 719–720, 55 RR 2d 959, 965 (Rev. Bd. 1981). Then, finally summing up on this point, CBC says "[a]ssuming for the present argument, that the current managerial positions of Frederick Barber and Eleanor Brown are not attributable to LBC, neither LBC nor CBC would receive any comparative preference under the diversification criterion of the standard comparative issue."

58. Addressing that "present argument" in its proposed conclusion, CBC argues that since Eleanor Brown who began her employment at Gannett in March 1985 and who pledged to leave Gannett on August 8, 1985, that pledge cannot be considered "contemporaneous" with the acquisition of that interest, citing *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1221–22 (Rev. Bd. 1984). Thus, Brown's managerial position at Gannett must be attributed to LBC in "at least" a very slight diversification preference for CBC over LBC; in like manner, Frederick Barber of LBC as General Manager of WTAE Division of the Hearst Corporation as a cognizable media intent disclosed formally by amendment of July 25, 1985, must also be attributable to LBC and here, again, CBC would suggest "a slight diversification preference over LBC."

59. Concerning the alleged attributable media interest of LBC's Eleanor Brown, LBC's version of the nature and extent of her duties at Gannett's broadcast group does not rise to the level of significance necessary for attribution under diversification is more persuasive than CBC's thesis and supporting precedent; her position, as echoed by LBC, does not involve the situations of a

general management encompassing programming or sales at another broadcast station in enterprise, albeit her position might be described of managerial status; also as related by LBC to agree to be full-time at the proposed LBC facility reflected in a filed pre-hearing integration statement and even though during trial she may not have used the word "divest" herself of her broadcast employment interest, this would be little more than what LBC footnotes as "hairsplitting." Thus, no attributable media interest will attach to the person of Eleanor Brown; in similar manner, Frederick Barber, Jr. having recorded his intentions to work full-time as General Manager of the proposed LBC station upon grant would be mutually exclusive with his current employment at the Hearst broadcast enterprise if only premised on geographical grounds of Pittsburgh, Pennsylvania and Raleigh, North Carolina. Hence, no cognizable media interest will be assigned or assessed to Frederick R. Barber, Jr.

60. LBC contends on the other hand, that notwithstanding the timely "divestiture" pledges of CBC's principals CBC must be charged with "a substantial comparative demerit because of N. Grant Cotton's controlling ownership and management and day-to-day control of Television Station WLFL-TV, Raleigh, North Carolina." LBC argues further that "[t]here can be no question that the filing of Cotton's application and his posture throughout this case has delayed the institution of a new institution of a new, second independent television service on Channel 50 will reduce the value of Television Station WLFL-RV." And LBC rejects Cotton's argument that his divestiture pledge is analogous to his cited *Morris, Pierce and Pierce*, 88 FCC 2d 713, 719-720 (Rev. Bd. 1981). "Here," says LBC, the divestiture pledge is undermined by N. Grant cotton's 70.199% ownership of a television station in the same city where he has filed an application for a new television station and that "Cotton already owns what he claims to be seeking."

61. Having addressed what is says it a clear instance where a substantial demerit under diversification is warranted against CBC, LBC seems to retreat from that positive notion by saying that if the forum is not so persuaded that "for all practical purposes, [the parties] [are] equal under the diversification criterion." Yet, granting the validity of Cotton's or CBC's divestiture pledge, there appears to remain that all-embracing notion underlying the long-established diversification objective, that is, whether given the validity of divestiture pledge and a new LBC corporate person for the facilities here in contest a "new voice," rather than

the "same voice" or "old voice" will be entering the community of Raleigh, North Carolina. See *Associated Press* v. *United States*, 326 U.S. 1, 20 where it is set forth that the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

62. Were CBC divesting from the ownership in another remote community or even relatively close to the community of Raleigh, its pledge might be fully persuasive in its purport. Here, albeit a different corporate person, CBC's principals, particularly N. Grant Cotton, would be the same voices already present, established and, perhaps, pervasive in the Raleigh community. This condition is fairly distinguished from the permissible case of AM/FM combinations or where an applicant seeks a greater or more efficient frequency in the same community, the notion of "new voice" not being dispositive. Hence, it would seem that a *residuum* of the evidence, at least permits that a cognizable diversification demerit would attach to the CBC application and it is so found.

D. Best Practicable Service

63. Under the *Policy Statement on Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393 (1965) and a plethora of guiding and binding precedent reposing in that *Polciy Statement* which of competing applicants, comparatively, will better honor the objective of proposing the "best practicable service" is of substantial importance, albeit perhaps less than the primary significance of diversification in the decisional rationalization of choice; under that general objective are subsumed criteria addressed to, among others, full-time particiation by owners in station operation, previous broadcasting experience local residence and related civic activities connected with local residence; also related enhancement factors of female and minority participation in ownership.

64. CBC would have it that no integration credit should be given LBC's Eleanor Brown on the notion that LBC's Evelyn Barber had "*de jure*" control over LBC as at all pertinent deadlines." LBC rejects this argument are nothing more than "make weight"; that, indeed, Eleanor Brown is entitled to full integration ownership credit inasmuch as Brown became a partner prior to the "B" cut-off date; that the unrebutted facts are that Ms. Brown is a general and limited partner; that she paid for her initial general partnership interest at the time the partnership was

formed prior to the "B" cut-off date; that she has subsequently paid a total of $5,500 to LBC in connection with her 1/3 pro-rata share of LBC's expenses; that she has paid $350 for her limited partnership interest and plans to resign her current employment as well as devote her full-time efforts to LBC's station should it receive the grant.

65. Next responding to CBC's argument that Evelyn Barber should be credited with but 33% integration, LBC argues that as at the "B" cut-off date, LBC consisted of three general partners and one limited partner and that all general partners had paid for their interests. "Since, as a matter of law, each general partner has the legal authority to act for and bind the partnership all three of the general partners individually and collectively have *de jure* control over LBC" not Evelyn Barber, LBC adds. "LBC is entitled to 100% quantitative integration of ownership into management" LBC urges, and under a fair analysis of the record of evidence its contention is persuasive and LBC will be accorded that 100% integration credit.

66. LBC would then have it that CBC is not entitled to 100% integration credit because "two of its erstwhile general partners did not pay anything for their partnership interests until well after the date filed by the Presiding Officer for the parties to exchange their integration proposals." Indeed, LBC continues, CBC's "ownership was fatally fluid and informal when it should have own firm. Since Michael G. Cotton and his sister Kathryn Cotton Banks did not [own] their interests as of the integration exchange date" that the appropriate approach is to deny integration for their proposed participation, citing *Houston Family Television, Ltd.*, 58 RR 2d 1557, 1561 (Rev. Bd. 1985). There, as here, the parties were instructed to exchange the filing of "final integration proposals" on a given date. That given date was "critical" in evaluating a party's integration proposal not another, presumably, later date. Yet, in evaluating the particular integration proposal, the Review Board found "only two of the seven, representing a mere 22.5% of Alliances Corp.'s stock had even signed stock subscription agreements by the date — eight months after formal incorporation and seven months after Alliances Corp.'s application was filed" (at 1561). Eschewing such "integration gamesmanship" the Review Board concluded that "[a] timely binding subscription agreement is the minimum price of admission

for quantitative ownership integration credit" (at 1562).

67. CBC rejects reliance by LBC on *Houston Family, supra*, particularly its assertion that CBC principals had not paid for their ownership interests prior to the integration exchange date. Noting that in *Houston Family* integration proposals were refused credit because principals who were not shareholders and had not even signed stock subscriptions agreements as of the date of integration statements were filed does not in any manner apply here, CBC argues. CBC relates that its Partnership Agreement as of the date of its integration statement not only commands each partner to provide *pro rata* capital contributions as well as assume *pro rata* responsibility for the company's losses; as well as General Partners they assume personal liability for the partnership debts and obligations. This condition is even more significant than a stock subscription agreeement which was found acceptable in *Houston Family*, CBC notes. CBC also chides LBC for its *Houston Family* argument adding that LBC principal, Eleanor Brown, had paid only "a token amount — $50" as of the date of the integration statements deadline for filing integration statements. CBC's thesis and argument are sound, thus persuasive and CBC will be accorded and credited with 100% quantitative management/ownership integration. As noted earlier, LBC too, has been accorded equal 100% quantitative integration.

E. Local Residence

68. Respecting LBC, two of its principals, Mr. and Mrs. Barber, constituting 66% of the general partnership interest resided in Raleigh for 3-1/2 years but moved away six years ago. While all of LBC's principals propose to move to Raleigh, that past residence and proposed future local residence would be entitled to only slight credit. CBC's principals have resided within the Raleigh service area over 23 years in Durham which is part of the Raleigh-Durham "hyphenated" television market; that all of CBC's principals have been working at a television station licensed to Raleigh. Grant Cotton CBC's 51% principal proposes to continue to reside in Durham while Michael Cotton and Kathryn Banks propose to move to Raleigh. LBC would have it that Kathryn Banks and Michael Cotton should be given no credit for their proposed move to Raleigh noting that such proposals were not specifically discussed in CBC's integration proposal. In an odd interpolation of the *Order* directing the parties to file their total integration reports, CBC comments that the Presiding Judge did not specify exactly what should be

included in that integration statement. "Total" would seem to the ordinary mind "to signify," "complete in every respect," "nothing further needed, expected or permitted" to name a few. Unlike its position concerning the General Partnership interests, CBC's reasoning falters somewhat on this attribute of local residence affecting two of its principals using the yardstick of the reporting date; again a slight perference for residence of CBC's principals in the proposed service area would be credited to CBC.

F. Civic Activities

69. As the *Policy Statement* relates "[p]ast participation in civic affairs will be considered a part of participating owner's local residence bankground . . ." (at 396). CBC seems to admit that LBC while listing "numerous civic activities" for two of its principals, at least "only a handful of those activities were with the service area, Eleanor Brown would not be credited with any such activities in the proposed service area. Yet, CBC also seems to concede, that the "evidence however does not provide sufficient distinction between the levels of activity to justify the award of a preference to either applicant (Cotton Proposed Findings at p. 26). But, conversely, argues that CBC's Grant Cotton as General Manager of Station WLFL-TV required him to be familiar with and respond to the needs and interests of Raleigh residents. There seem times when comparative considerations seem to pose notions of the finest hairsplitting even, perhaps, suggesting contemplation of counting spiritual entities on the pinnacle of a pin; yet, this close scrutiny is the governing mandate of the system; that however skillfully devised an applicant's proposal — a matter not only permissible but perhaps even encouraged — comparative choice, even in seeming inscrutable difference or nuance, has been the traditional and valid touchstone in the grant of license for a public franchise. *NBC* v. *U.S.*, 319 U.S. 190 (1943). Here, LBC's principals Fred and Evelyn Banks have to a discernible degree been involved in civic activities in Raleigh, the proposed community of license while as LBC would have it, CBC's similar activities greatly less, albeit not "virtually non-existent." Thus, a slight preference on this score will be credited to LBC.

G. Minority Integration and Female Ownership

70. LBC's Eleanor Brown, a 33-1/2 owner or interest holder, is a Black female and as a minority person would enhance LBC's integration proposal. *Sun Joaquin Television Improvement Corp.*, 94 FCC 2d 594 (Rev. Bd. 1983); thus, on this count, a slight

preference would be accorded. CBC while having a female member, though not considered minority but otherwise entitled to an enhance must preference under abiding precedent. *Steele* v. *FCC*, 770 F.2d 1192 (D.C Cir. 1985), which would have terminated female preference enhancement was vacated and granted rehearing *en banc* by *Order* #84-1196, October 31, 1985. This, too, has been questioned by CBC noting that in *Talleyrand Broadcasting*, 59 RR 2d 563, 567 (Rev. Bd. 1985), reflecting statements in the trade press that "the Commission has been content to have the [female] preference killed" and that "the agency is willing to live with the [panel's] decision" attributed to "a Commission official."

71. In summing up this enhancement feature under the *Policy Statement, supra*, and other precedent and heeding the implicit guidance of that appellate body, LBC would slightly prevail over CBC, were the female attributes of both LBC and CBC be put to the side or equalized because of the "confusion" obtaining *vis a vis*, the Commission and the Court's ultimate position. LBC because of Eleanor Brown's minority ownership status — yet an efficacious attribute — would, on that score, warrant a slight enhancement preference over CBC.

H. Broadcast Experience

72. As noted in the *Policy Statement, supra*, previous broadcasting experience includes activity which would not qualify as past broadcast record, i.e., where there was not ownership responsibility for a station's performance. "Since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience generally confers only an initial advantage, it will be seemed of minor significance" (at 396). The broadcast experience propounded for Fred Barber and Eleanor Brown weighed against that of Messrs. Grant and Michael Cotton is too amorphous to give either applicant a cognizable preference.

I. Comparative Coverage

73. As the Bureau urges (and LBC supports) no preference should be given to either applicant. This is the case because while CBC will provide slightly greater service to a slightly greater population than LBC, the differences is so insignificant as not to afford a preference to either applicant, and it is so concluded.

74. This, as with many, is a truly close comparative case. Both applicants would warrant 100% integration of ownership with management; the applicants' broadcast experience would amount to little more than a dead heat; local residence and civic activities

would slightly favor CBC; also a discernible; thus, cognizable preference enhancement would be accorded LBC for the minority status of its 33% owner, Eleanor Brown. But to this mind, while even that enumeration would favor LBC, on diversification grounds earlier noted, on the notion of adding a "new voice" to the proposed community of license, Raleigh, North Carolina, LBC would be even entitled to a more substantial preference. This notwithstanding and in the face of the apparent perfection of LBC's divestment of WLFT-TV in *Memorandum Opinion and Order*, FCC 86-75, released February 13, 1986.

75. Respecting that thesis of diversification demerit, it would seem that the *Valdosta* Doctrine can be readily distinguished here. In *Valdosta Broadcasting Co.*, 11 FCC 769 (1946), where the Commision in choosing between an existing station which sought a change in frequency and increase power, said that the establishment of a competing service cannot be deemed controlling; that consideration should also be given to the past performance of the existing station and its efforts to improve its facilities. Then in a subsequent case, the Commission described its *Valdosta* holding to be "that of the proposals of time-competing applicants were equally meritorious and if the qualifications of the applicants were otherwise substantially the same" the Commission could better rely upon an established record than upon promises of meritorious service. *Mid America Broadcasting Corp.*, 12 FCC 2d 282, 293, (1947).

76. In a matter touching upon *Valdosta* and *Mid America*, the U.S. Court of Appeals, D.C. Circuit in *Julie Miner* v. *FCC*, U.S. App. D.C. Case #78-1903, December 1, 1980, reversed and remanded to the Commission's holding that *Miner* under the Policy Statement's diversification criterion in a comparative broadcasting hearing, "diversification disposition must be achieved in a way that is fair and does not automatically disadvantage existing licensees who have a record of service in favor of untried newcomers. The FCC must impartially seek information — and not require the existing licensee to overcome an insurmountable burden of proof" (at p. 12). Additionally, the Court there observed "[t]he key to the . . . Initial Decision and the Review Board's Decision is their assertion that Crain will bring a 'nice voice' to St. George and 'will provide the only completion to a two-station local monopoly.' " It appears that the case on remand was not re-tried under the Court's guidelines and admonition premised on a later settlement or "buy out" between the parties.

77. The facts in this proceeding seem quite clear with a timely promise to divest, WLFL-TV by CBC's Cotton, now perfected in the *Memorandum Opinion and Order, supra.* There is no question here to ponder, as the Court in *Miner* indicated, "as to what will happen to both the old and the new stations depending upon on who is licensed to operate the more desirable one." Cotton's WLFL-TV is now assigned to another enterprise. Would it be termed an "insurmountable burden" to have imposed at the outset here the shadow of an "old voice" versus a "new one"? Why it might be asked, as does CBC's opponent LBC, would CBC abandon a television station on Channel 22 in favor of the instant Channel 50 — "because of its dial position [22] is technically preferable to Channel 50," says CBC. Or is it as LBC concludes, "[t]here can be no question that the filing of Cotton's application and his posture throughout this case has delayed the institution of a new television service to Raleigh." Yet, neither postulate is demonstrated in the evidence, nor conceivably by clear implication; only in the exhortation of LBC's argument.

78. If what has been considered the pervasive principle of "diverse and antagonistic sources" as the bedrock of information to be disseminated for the welfare of the public as set down in *Associated Press, supra,* still obtains, clearly here a choice imbedded in that principle would favor LBC. And not to belabor a putative entrapment in the mire of the swamp of one's own handiwork, although better minds may disagree, let it be said that echoing the borrowed wisdom of *Associated Press*, the *residuum* of the evidence here warrants the imposition of a recognizable demerit on diversification ground to CBC, albeit a moderate one.

79. But, even if that notion cannot be supported and sustained, nevertheless, LBC must prevail over CBC in the criteria underlying the "best practicable service to the public" on the minority enhancement of LBC's Eleanor Brown, a Black person as well as a female; not to speak of a more pronounced civic activities preference service to LBC. Hence, it is found that LBC must prevail here.

Accordingly, for the foregoing reasons the application of The L Broadcasting Company for the captioned facilities at Raleigh, North Carolina may be AND IS HEREBY GRANTED; the application of Cotton Broadcasting Company for those same facilities therefor must be AND IS HEREBY DENIED.[3]

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[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Deputy Chief Administrative Law Judge*

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motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47CFR 1.276(d)).

Program Logs, Public Inspection of
Public Inspection of Local Station File

> **The Commission required that a commercial radio licensee, each quarter, list those programs aired during the proceeding quarter which provided the station's most significant treatment of issues of concern to the broadcaster's community. —*Deregulation of Radio***
> **BC Docket No. 79-219**

FCC 86-222

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Deregulation of Radio	BC Docket No. 79-219 RM-3099 RM-3273

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: May 1, 1986; Released: May 28, 1986

BY THE COMMISSION:

1. The matter before us is the action of the United States Court of Appeals vacating the Commission's *Second Report and Order*[1] in this proceeding and the court's remand of the case for further proceedings.[2] Specifically, the court found that an illustrative issues/programs list does not further the Commission's stated regulatory goal of relying on effective public participating in the license renewal process. Moreover, the court concluded that the Commission has failed to provide an adequate explanation for its rejection of an alternative proposal, submitted during the notice

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[1] 96 FCC 2d 930 (1984).

[2] *Office of Communication of the United Church of Christ v. FCC* ("UCC IV"), No. 84-1239, Slip Op. (D.C. Cir. December 20, 1985).

and comment proceedings, that would advance its stated goal.

2. In the first *Report and Order* in this proceeding, the Commission deleted its guidelines regarding nonentertainment programming and commercial levels and eliminated both the ascertainment and program log keeping requirements for commercial radio stations.[3] In doing so, however, the Commission continued to recognize the obligation of commercial radio broadcasters to provide coverage concerning issues of importance facing their communities. To document compliance with this duty, licensees were required to prepare an issues/programs list, exemplary in nature, to be placed annually in each station's public inspection file. The list was to contain in narrative form a brief description of from five to ten issues to which the licensee gave particular attention with programming and the date, time and duration of the broadcasts.

3. In response to the court's partial remand of the first *Report and Order*[4] the Commission, in the *Second Report and Order*, expanded the issues/programs list to provide a broader base of information to the public and the Commission than was previously available. Specifically, we eliminated the limitation that no more than ten issues be listed and required that the issues/programs list be prepared and placed in licensees' public files on a quarterly basis. On appeal, the court found that this rule would make a "non-trivial quantity of data" available over the period of a license renewal term, but determined that it was nonetheless inadequate under the regulatory approach adopted by the Commission in the radio deregulation proceeding. The court was still concerned that an issues/programs list which purports to be "merely illustrative" does not allow for effective public participation in the license renewal process.[5] The court suggested that the goal of making adequate issue responsive programming information available to potential petitioners to deny could be achieved by requiring public file records reflecting a licensee's most significant programming treatment of community issues.[6]

4. We believe that this type of record keeping requirement can give the public substantial and sufficient information about a station's issue responsive programming to determine whether a station has fulfilled its programming obligation, without, on the

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[3] *Report and Order*, 84 FCC 2d 968 (1981), *recon. granted in part, Memorandum Opinion and Order*, 87 FCC 2d 797 (1981).

[4] *Office of Communication of the United Church of Christ v. FCC* ("UCC III"), 707 F.2d 1413 (D.C. Cir. 1983).

[5] *UCC IV* at 17–18.

[6] *UCC IV* at 20–21.

other hand, unduly burdening the licensee. Thus, a radio licensee will be required to maintain in its public files quarterly lists of programs which, in the exercise of the broadcaster's good faith judgment, represent the most significant treatment by the station of the issues that the licensee believed to be of community concern.

5. The court in *UCC IV* upheld the Commissions' judgment that a licensee should not be compelled by rule to list *all* of its issue responsive programming, and, it should be stressed that the rule we adopt herein does not impose a requirement to maintain comprehensive public file lists.[7] We continue to believe that a comprehensive requirement would place an inordinate record keeping burden on many licensees.[8]

6. Authority for the action taken herein is contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, That the Commission's Rules ARE AMENDED, effective June 27, 1986, as described above and set forth in the attached Appendix.[9]

8. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE this *Memorandum Opinion and Order* to be printed in the FCC Reports.

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[7] For example, a licensee that presented numerous program responses to an issue need not list all such programming. Rather, it should list only the most significant programs which dealt with the matter, omitting responses which may not have dealt with the issue in the same depth or at the same length as the listed programs. Similarly, a licensee's list need not include program responses to all issues of concern in the community.

[8] We find it appropriate to delete from the rules the 5 to 10 issue minimum listing provision. However, without impinging on the flexibility afforded licensees under radio deregulation, we believe it appropriate to indicate that, as a general matter, a licensee whose issue responsive programming lists document significant programming directed to 5 to 10 community issues during each quarter would likely be able to demonstrate compliance with the issue responsive programming obligation set forth in our radio deregulation *Report and Order*. 84 FCC 2d at 990-91. We note that this standard does allow for variance depending on the programming decisions of the licensee. A licensee might, for example, choose to concentrate on fewer than five issues and cover those in considerable depth over a quarter. Other licensees may cover more than 10 issues due to the format and program length assigned to issue responsive programming.

[9] The revision to Section 73.3526(e) of the rules contained in the attached Appendix encompasses both television and radio station licensees in order to reflect in a single amendment the concurrent record keeping changes implemented by our decision in this proceeding and, by separate opinion adopted today, in the television deregulation proceeding. *See Memorandum Opinion and Order* in MM Docket No. 83-670, FCC 86-223 (adopted May 1, 1986).

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding contact Freda Lippert Thyden, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.3526 is amended by revising paragraphs (a)(9) and (e) to read as follows:

Section 73.3526 Local public inspection file of commercial stations.

(a) * * *

* * * * *

(9) For commercial AM and FM broadcast stations, every three months a list of programs that have provided the stations's most significant treatment of community issues during the preceding three month period. The list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter (*e.g.*, January 10 for the quarter October-December, April 10 for the quarter January-March, etc.). The list shall include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. The description of the programs should include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

* * * * *

(e) *Period of Retention*. The records specified in paragraph (a)(4) of this section shall be retained for periods specified in § 73.1940 (2 years). The manual specified in paragraph (a)(6) of this section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this section shall be retained for the period specified in § 73.1202 (3 years). The "significant treatment of community issues" list specified in paragraphs (a)(8) and (9) of this section shall be retained for the term of license (5 and 7 years for TV and radio, respectively). The certification specified in paragraph (a)(10) of this section shall be retained for the period specified in Section 73.3580 (for as long as the application to which it refers). The records specified in paragraphs (a)(1), (2), (3), and (5) of this section shall be retained, as follows:

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Expenses
Petition for Reconsideration

Memorandum Opinion and Order adopted regarding the Petition for Clarification or Further Partial Reconsideration, granted, filed by AT&T concerning reimbursement to the Bell Operating Companies (BOCs) by AT&T Information Systems for exempt material expense. In addition to the grant of the petition, Commission ordered AT&T to reimburse the BOCs. *—Detariffing of Customer Premises Equipment*
CC Docket No. 81-893

FCC 86-238

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893
American Telephone and Telegraph Company, Request for Approval To Supplement the Capitalization of AT&T Information Systems in Connection with the Transfers of Embedded Customer Premises Equipment	File No. ENF 83-18

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1986; Released: May 13, 1986

BY THE COMMISSION

I. INTRODUCTION

1. American Telephone and Telegraph Co., Information Systems, Inc., (AT&T-IS) filed a "Petition for Clarification or Further Partial Reconsideration" of our *Memorandum Opinon and Order*

on Reconsideration, (Reconsideration Order)[1] concerning reimbursement to the Bell Operating Companies (BOCs) by AT&T-IS for exempt material expense. Specifically, AT&T-IS requests clarification regarding the definition of the phrase, "exempt materials" and, depending on our intended meaning of this phrase, requests that we consider the formula used to calculate the amount of AT&T-IS's reimbursement.

II. BACKGROUND

2. In the *Second Computer Inquiry* (Computer II) we determine that the BOCs' customer premises equipment (CPE) should be removed from tariff regulation.[2] New CPE was to be detariffed on January 1, 1983, while detariffing of "embedded" CPE was to be phased in to allow time for resolution of the many issues raised by the removal from regulation of such large amounts of assets and reserves. We further determined that AT&T should be allowed to provide detariffed CPE, but only through a structurally separate subsidiary. We instituted our proceeding in Docket No. 81-893 to carry out the detariffing of the embedded base.[3] At the same time we began reviewing AT&T's plan for capitalization of its separate subsidiary, now known as AT&T-IS. While we were thus engaged in the implementation of our Computer II decisions, the United States District Court for the District of Columbia entered the Modification of the Final Judgment (MFJ)[4] which required AT&T to divest itself of the BOCs and most of the assets held by those companies. Under the Plan of Reorganization which the Court approved, the embedded base of CPE owned by the BOCs was to be transferred to AT&T-IS at divestiture. As a result of the interplay between Computer II and the MFJ, we decided to make detariffing of the BOC embedded base effective at the time of divestiture and were obliged to resolve valuation questions in order to ensure that the transfer was implemented in

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[1] Memorandum Opinion and Order on Reconsideration, FCC 85-35 (released January 21, 1985), 50 Fed. Reg. 9016 (March 6, 1985).

[2] Second Computer Inquiry (Computer II) 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 5 (1981), *Further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* (Computer & Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[3] Notice of Inquiry, Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), 89 FCC 2d 694 (1982).

[4] See the Modified Final Judgement (MFJ) of the United States District Court for the District of Columbia (District Court) in *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom. Maryland v United States*, 460 S. Ct. 1001 (1983).

a manner that was consistent with the rights of ratepayers and investors.

3. One of the valuation issues addressed in the *First Report and Order* in Docket No. 81-893 involved the 1983 BOC "exempt materials" expense.[5] Exempt materials were described as (e.g., wires, cables) used in the installation and maintenance of CPE, and in the *First Report and Order* we stated:

> AT&T shall then reimburse the BOCs 50 percent of the unallocated balance of 1983 exempt materials expenses.[6]

4. On January 30, 1984, AT&T-IS filed a petition for partial reconsideration of this order. AT&T-IS argued that the exempt materials expense in question was associated, not with the transferred CPE investment, but with station connections investment retained by the BOCs at divestiture. In the petition AT&T-IS suggested that the Commission may have intended to refer to "other expensed materials", which are minor items used in the repair and maintenance of CPE,[7] instead of "exempt materials". AT&T-IS claimed that, even if this Commission intended to refer to "other expensed materials", AT&T-IS should not be required to reimburse the BOCs. According to AT&T-IS, this material was either used by the BOCs during 1983 to repair embedded CPE, or it was transferred for AT&T-IS' use in repairing in place embedded CPE which was available for purchase under the in-place sales plan.[8] AT&T-IS argued that, in the former case, it should not have to pay for materials it did not receive. In the latter case AT&T-IS claimed that it was not required to pay because this Commission had found that it need not reimburse the BOCs for the cost of refurbishing in-place embedded CPE.[9]

5. After considering the AT&T-IS petition and the comments of the BOCs and others, this Commission released its *Reconsideration Order* on January 29, 1985. In that order this Commission

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[5] 95 FCC 2d 1276 (1983). (hereinafter First Report and Order).

[6] *Id*, at 1384.

[7] For example, small repair parts such as bulbs, buttons, and cords.

[8] First Report and Order, 95 FCC 2d at 1336.

[9] In the First Report and Order this Commission found that requiring AT&T-IS to reimburse the BOCs for the refurbishment costs associated with the in-place embedded CPE would be unnecessary, because these costs had already benefitted the customers through their effect of lowering depreciation rates. Furthermore, the customers' interests were protected by the removal of these assets from the BOCs' books at net book cost at divestiture and through their opportunity to purchase the in-place CPE under the terms of the in-place sales program which included *no* increment for the 1983 refurbishment expenses. See 95 FCC 2d at 1387, 1388.

defined exempt materials and revised our formula for reimbursement of refurbishment costs, but we did not revise the formula for reimbursement of exempt materials expense.[10]

III. THE PLEADINGS

6. On April 5, 1985, AT&T-IS filed a second petition for clarification and further partial reconsideration. The BOCs filed comments[11] opposing the AT&T-IS petition. AT&T-IS filed reply comments.[12]

IV. DISCUSSION

A. Definition of Exempt Materials

7. In paragraphs 76 and 77 of the *Reconsideration Order* we defined exempt materials and the reimbursement formula that would be used for those items:

> 76. Regarding exempt materials, we first must clarify the intended definition and the underlying assumptions in our *Order*. It was our intent to refer only to the inventory of materials and supplies for refurbishing CPE inventory which was transferred.
>
> 77. In conclusion, therefore, we require AT&T-IS to reimburse the regulated BOC entities as follows. First, the exempt materials expense (expensed assets) associated with the CPE being transferred should be separated from the total refurbishment expense associated with that same CPE. Then, based on the premises stated in the *Order*, we required AT&T-IS to reimburse the regulated entities for 50 percent of the exempt materials expense not previously allocated to AT&T-IS.

8. AT&T-IS states that in Paragraph 76 of the *Reconsideration Order* this Commission defined "exempt materials" to refer to the inventory of CPE repair parts transferred to AT&T-IS at divestiture. It believes that when this Commission referred to exempt materials in the explanation of the reimbursement determination (in paragraphs 76 and 77 of the *Reconsideration Order*) we were using that same definition of exempt materials. On the other hand, in their comments the BOCs state that the term "exempt materials" in paragraph 77 of the *Reconsideration Order* referred to the BOCs entire 1983 exempt materials expense, not just the

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[10] Reconsideration Order at para. 76.

[11] Two filings were made by the BOCs, one by all of the BOCs except the US West carriers (majority BOC filing), and the other by the US West carriers.

[12] Copies of these comments and reply comments are available for inspection in the offices of the Accounting and Audits Division of the Common Carrier Bureau at 2000 L Street, N. W., Suite 812, Washington, D.C.

inventory of this account at divestiture.

9. In the *Reconsideration Order*, we explicitly referred to the *inventory* of material and supplies only, and not to the portion of this account which has already been installed on telephone sets either on customer premises or in the telephone company warehouses and vans. AT&T-IS' interpretation of our use of "exempt materials" is correct.[13]

10. The interpretation put forth by the BOCs, on the other hand, is not only inconsistent with the plain language in paragraph 76 quoted above, but would also be inconsistent with our original order, which stated that AT&T need not reimburse the BOCs for refurbishment costs associated with in-place CPE.[14] This is so because a substantial portion[15] of the total 1983 BOC exempt materials expense was expended to refurbish telephone sets that were "in-place", i.e. in service on customer premises by the time of divestiture.

B. Reconsideration of the Reimbursement Formula.

11. In its petition AT&T-IS requests that, if this Commission should interpret "exempt materials" as the cost of the inventory of CPE repair parts transferred to AT&T-IS at divestiture, we should change the reimbursement formula, which currently calls for reimbursement of only 50% of these costs, to 100% of these costs. AT&T-IS argues that it should reimburse the BOCs for 100% of these costs because it received the entire inventory at divestiture and these parts had a value essentially equal to their original cost.

12. We agree with AT&T-IS that it is unreasonable to reimburse the BOCs for only half of the value of the exempt materials inventory transferred at the time of divestiture. We therefore order AT&T-IS to reimburse the BOCs for the full value of the exempt materials inventory that was transferred at divestiture.

C. Determination of Cost of Exempt Expense Inventory at Divestiture

13. With the clarification of the definition of exempt materials and the revision in the reimbursement formula discussed above, a further matter must be resolved: What was the cost of the

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[13] See Reconsideration Order at para 76.

[14] First Report and Order, 95 FCC 2d at 1388.

[15] According to AT&T-IS, at least 77% of the sets refurbished in 1983 were placed in customer service by the time divestiture took place.

exempt material expense inventory at divestiture?

14. In its petition herein, AT&T-IS provided an affidavit[16] stating that the BOCs maintained an inventory of complete CPE units sufficient for approximately 32 days, and that repair parts were generally maintained for lesser periods than were the complete CPE units. The BOCs did not dispute AT&T-IS' assertion of a 32 day inventory for complete CPE. They did argue that the inventory period for repair parts is unrelated to that of complete CPE units, but they failed to provide any information as to how we could reasonably determine what the level of repair parts inventory might have been. Absent additional information, we find AT&T-IS' analysis and conclusions to be reasonable.[17] Accordingly, we will use a 32 day inventory level to determine the value of the exempt materials inventory.

15. The BOCs also disputed the AT&T-IS figures as to the total 1983 exempt materials expense. AT&T-IS estimated the figure to be $152 million while the BOCs stated the actual figure was $200.6 million.[18]

16. In its reply comments AT&T-IS accepted all but $23 million of the BOC 1983 exempt material expense estimate.[19] AT&T-IS claimed that the BOCs had provided insufficient data to support reimbursement based on this amount. Because of the dispute our staff requested and analyzed additional information and determined that some of the $23 million was, in fact, exempt materials, expense related to CPE, but that a substantial portion of the associated equipment was not transferred to AT&T-IS at divestiture, rather it was retained by the BOCs as official equipment.[20] The staff analysis shows that $14.3 million of the $23 million was associated with equipment retained by the BOCs at divestiture. We therefore find that the $200.6 million proposed by the BOCs

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[16] See AT&T-IS Petition for Clarification, affidavit of Earl L. Mason, dated April 5, 1985.

[17] We note that in earlier investigations our staff has verified that other telephone carriers generally maintain CPE repair part inventories at levels of one month or less.

[18] This figure is the sum of the $182.9 million listed on Appendix A of the majority BOC comments and the $17.7 million derived from page 8 of US West's comments.

[19] The $23 million in dispute was referred to as 605 (other) in Appendix A of the BOC majority comments.

[20] Most of the $23 million in question was associated with teletypewriter equipment; in contrast with most of the CPE categories, the BOCs retained relatively high percentages of teletypewriter equipment at divestiture.

should be reduced by $14.3 million to $186.3 million.

17. We estimate the value of the exempt materials expense inventory at divestiture to be the product of the 1983 BOC exempt materials expense and the ratio of the inventory period to 365 days, i.e.:

$$\text{1983 BOC Exempt materials expense X } \frac{\text{Inventory period (days)}}{\text{days in a year}}$$

$$\text{\$186.3 million X } \frac{32}{365} \text{ or \$16.3 million.}$$

Accordingly, we will use the $16.3 million figure derived herein as the value of the inventory transferred. The portion of the $16.3 million attributable to each of the seven Bell Regional Holding Companies was based upon the amounts submitted in the majority BOC and US West comments. These amounts are identified in the Appendix.

D. Interest

18. In their comments, the BOCs state that they are entitled to recover interest charges from January 1, 1984, on the funds used to purchase the materials and supplies defined as "exempt materials." They base this claim on this Commission's decision to direct AT&T to pay interest on amounts that AT&T was required to reimburse its affiliated carriers for preoperational expenses associated with development of enhanced services.[21] AT&T-IS claims in its reply comments that the BOC claim is untimely since the BOCs are making the claim almost a year and a half after the time for reconsideration of the *Reconsideration Order* has expired. AT&T-IS also claims that the demand for interest is inconsistent with the true-up procedures that have otherwise been used in the divestiture-related asset transfers.

19. The amounts that have become due for exempt materials transferred with the inventory of CPE transferred is nothing more than a part of a continuing series of adjustments that have become necessary as a result of divestiture. This process is one of great complexity, and one completely without precedent. These adjustments involve obligations whose nature and amounts become clear only as the consequences of the divestiture are identified. Therefore, these amounts differ significantly from the nature of preoperational expenses involved in the *Enhanced*

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[21] *Enhanced Services Order*, 90 FCC 2d 404, 426 (1982).

Services Order. We do not believe that interest should accrue on obligations arising from the true-up process until such time as the amount of an obligation, and to whom it is owed, is determined. We consequently reject the BOCs claim that they are entitled to interest from January 1, 1984, on the amounts attributed to exempt materials expense.

V. ORDERING CLAUSES

20. Accordingly, IT IS HEREBY ORDERED, that the Petition for Clarification or Further Partial Reconsideration IS GRANTED.

21. IT IS FURTHER ORDERED, that AT&T-IS reimburse the BOCs in accordance with paragraph 17 above and the Appendix within fifteen (15) days from the release of this Memorandum Opinion and Order.

22. IT IS FURTHER ORDERED, pursuant to Section 220(i), that the Secretary shall serve a copy of this Order on each State Commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Regional Holding Co.	*Reimbursement Amount ($ 000)*
Ameritech	2,321
Bell Atlantic	2,926
BellSouth	3,136
NYNEX	1,678
Pacific Telesis	2,308
Southwestern Bell	2,410
U.S. West	1,552
	16,331

Channel Assignment
Rules, Amendment of
Table of Assignment, See Frequency Assignment

Fourth Report and Order adopted amending Part 73 of the Commission's rules regarding the FM Table of Allotments, with the termination of a related proceeding involving co-channel and adjacent channel upgrades, action was taken to resolve the remaining counterproposals to make new FM allotments to various communities as proposed in the Further Notice or Proposed Rulemaking, *50 FR 2835*, January 22, 1985.

—*FM Broadcast Assignments*
MM Docket No. 84-231

FCC 86-210

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments.	MM Docket No. 84-231

FOURTH REPORT AND ORDER

Adopted: April 23, 1986; Released: May 9, 1986

BY THE COMMISSION:

Introduction

1. The Commission has before it the *Further Notice of Proposed Rule Making*, 50 Fed. Reg. 2835, published January 22, 1985, which proposed to make new FM allotments to various communities in response to five counterproposals filed in this proceeding.[1]

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[1] In the *First Report and Order*, 50 Fed. Reg. 3514, published January 25, 1985, the Commission allotted 689 new FM channels to various communities based on the following six priority factors for comparing counterproposals with the originally proposed communities: 1) first aural service; 2) second aural service;

The counterproposals involved the following communities: 1) Corbin, Kentucky; 2) Jacksonville, North Carolina; 3) South Pittsburg, Tennessee;[2] 4) Vergennes, Vermont; and 5) LaCrosse, Wisconsin.

2. As we noted in the *Further Notice*, three counterproposals (Corbin, Kentucky; Vergennes, Vermont; and LaCrosse, Wisconsin) were accepted for consideration by specifying the category of "provision of first and second aural service." The fourth counterproposal for Jacksonville, North Carolina, was accepted by specifying the provision of "minority-oriented service." These counterproposals also involved the substitution of higher class adjacent channels and the modification of licenses. Consideration of these counterproposals was deferred due to the pendency of MM Docket No. 85-313, *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 51 Fed. Reg. , published May , 1986 (herein referred to as Docket 85-313), involving co-channel and adjacent upgrades. Since that proceeding was just concluded, we are now in a position to resolve these remaining counterproposals as set out in the *Further Notice*.

3. Under existing procedures, the Commission may modify the authorization of a station seeking upgraded facilities where at least one additional equivalent channel is made available for other parties who expressed an interest in the new channel in the course of the rule making proceeding. See, *Amendment of the Commis-*

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3) first local service; 4) first fulltime local service; 5) minority service; and 6) public radio service. Subsequently, in the reconsideration to the *First Report and Order* (see, *Memorandum Opinion and Order*, 50 Fed. Reg. 47391, published November 18, 1985, reconsideration pending 51 Fed. Reg. 5254, published February 12, 1986), the Commission allotted 12 new channels, deleted 5 channels and made 14 substitutions of channels based on a compelling showing of need or a showing of Commission error in the allotment of the original 689 channels. In the *Second Report and Order*, 50 Fed. Reg. 15558, published April 19, 1985, the Commission: 1) accorded an enhancement credit for daytime-only AM licensees who apply for FM channels in the same community subject to certain eligibility criteria; (2) announced a random selection system for making the 689 allotments available for application; and (3) lifted the restrictions on filing petitions for new allotments. In the reconsideration of the *second Report and Order* (see, *Memorandum Opinion and Order*, 51 Fed. Reg. 9210, published March 18, 1986), the Commission affirmed its grant of a credit for daytime-only broadcasters when applying for FM allotments. In the *Third Report and Order*, 50 Fed. Reg. 31721, published August 6, 1985, the Commission resolved counterproposals involving the use of Channel 300 at Calhoun, Georgia, South Pittsburg, Jasper and East Ridge, Tennessee, by allotting Channel 300A to East Ridge as that community's first local service. That decision was affirmed on reconsideration. See *Memorandum Opinion and Order*, FCC 86-55, released January 27, 1986.

[2] This proposal was addressed in the *Third Report and Order, supra* (see footnote 1) and will not be further discussed herein.

sion's Rules Regarding the Modification of FM and Television Station Licenses, 98 FCC 2d 916 (1984), *Recon. denied* FCC 86-32, Mimeo No. 36378, released January 17, 1986. (herein referred to as the "Helena proceeding"). However, as a result of the decision in Docket 85-313, where the requested higher class channel is adjacent to the current channel of operation, it is now unnecessary to consider competing expressions of interest or demonstrate the availability of an additional equivalent channel. (See, Docket 85-313, *supra.* which amended Section 1.420(g) of the Commission's Rules.) The remaining four sets of communities can therefore be considered in light of the new Section 1.420(g) of the Rules.

Corbin and Barbourville, Kentucky; Coeburn and Clinchco, Virginia and Jellico, Tennessee

4. Crawford Broadcasting, Inc. ("Crawford"), licensee of Station WCTT(FM), Channel 296A, Corbin, Kentucky, filed a counterproposal requesting the allotment of Channel 297C2 to Corbin and modification of its license to specify the new channel. This proposal conflicted with the Commission's proposal to allot Channel 294A to Jellico, Tennessee, to provide that community with its first fulltime local service.

5. Other parties expressing interest in applying for the new Corbin channel and opposing modification of Crawford's license were Williamsburg Broadcasting, Inc. ("Williamsburg"), Patricia L. Powell ("Powell"); and Vernon Broadcasting ("Vernon"), licensee of Station WYGO-FM, Channel 257A, Corbin. Vernon and Barbourville Broadcasting Co., Inc. ("Barbourville"), licensee of Station WYWY-FM, Channel 228A, Barbourville, Kentucky,[3] also filed counterproposals. Vernon requests that the Commission allot Channel 258C2 in addition to Channel 297C2 to Corbin and to modify both licenses to specify operation on the adjacent channels.[4] Crawford also filed a petition for reconsideration which has

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[3] Barbourville's counterproposal requested that Channel 242C2 be allotted to Barbourville. It states that there is a nexus with his proposal which required the Corbin channel to be "effectuated in order for Channel 242C2 to be allotted to Barbourville due to IF interference (54 channels removed) between Channel 242C2 and Channel 296A, Corbin's present allocation. Commission engineering studies indicate that the Channel 242C2 proposal for Barbourville would be short spaced to the allotment of Channel 243A to Harrogate, Tennessee, in the *First Report and Order, supra.* Barbourville's counterproposal should have been filed in response to the *Notice of Proposed Rule Making*, in MM Docket 84-231, 49 Fed. Reg. 11214, published March 26, 1984. Therefore the proposal is late filed and unacceptable.

[4] Public Notice of Vernon's counterproposal (RM-4906) was given on March 21,

been incorporated into this proceeding to resolve allegations that the Commission's action in the *First Report and Order, supra,* allotting Channel 297A to Coeburn, Virginia, precludes the allotment of Channel 297C2 to Corbin, Kentucky. Crawford, Vernon, Dickenson County Broadcasting ("Dickenson") and Ernestine Hill filed comments to the reconsideration. Crawford and Vernon filed additional comments relating to Vernon's counterproposal.

6. The initial question is whether the Jellico proposal (which would provide a first fulltime local service) or the Corbin proposal (which would provide a second aural service to new areas) should be preferred since both cannot be allocated on adjacent channels.[5] The weighting factors would appear to favor the Corbin proposal. However, as the Commission has pointed out in the *First Report and Order, supra.*, para. 9 and 11, our primary goal in the allotment process is to provide the greatest possible service to the population as a whole and to accomodate conflicting proposals if alternate channel allotments are available. Engineering studies indicate that Channel 274A is alternatively available for allotment to Jellico, Tennessee. Therefore, since both proposals can be accomodated the Commission shall consider the allotment of Channel 274A to Jellico, Tennessee.

7. Crawford's petition for reconsideration asserts that the Commission's action in the *First Report and Order, supra.*, allotting Channel 297A to Coeburn, Virginia[6] has denied Crawford consideration on the merits of its counterproposal to allot Channel 297C2 to Corbin, Kentucky. Crawford suggests that this oversight can be remedied in either of two ways (1) substitute Channel 226A at Coeburn, Virginia, or (2) substitute Channel 259A at Coeburn and Channel 226A for Channel 259A at Clinchco, Virginia. Ernestine Hill, the proponent for the Coeburn allocation, supports the alternative suggestion of Channel 259A because it will provide greater siting flexibility than the allotment of Channel 226A. Dickenson, licensee of Station WDIC(AM), Clinchco, Virginia, opposes the alternative suggestion alleging

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1985, Report No. 1502.

[5] Jellico, Tennessee, and Corbin, Kentucky, are 35.1 kilometers (22 miles) apart and for third adjacent channels the minimum distance separation requirement is 55 kilometers (34 miles). Therefore, both allotments cannot be made on adjacent channels.

[6] Corbin, Kentucky, and Coeburn, Virginia, are 144 kilometers (90 miles) apart and for co-channel Class C2 and Class A stations the minimum distance separation requirement is 163 kilometers (101 miles). Therefore both allotments cannot be made.

that a channel substitution at Clinchco, Virginia, would delay the preparation and filing of its application for an FM channel in that community. Vernon opposes any changes at other communities alleging that the allocation of Channel 297C2 to Corbin, Kentucky, does not require any channel substitutions if the transmitter is sited approximately 12 miles southwest of Corbin. In response Crawford contends that Channel 297C2 cannot be sited 12 miles southwest of Corbin because terrain obstructions to the south and southwest preclude city grade coverage to Corbin and the other areas for a site in that direction would be located within the Daniel Boone National Forest.

8. In response to Crawford's allegation, the Commission has reviewed the allotment procedures and the "optimization" process which allocated the present channels at Coeburn and Clinchco, Virginia. The sequence of events began with the filing of a counterproposal for Channel 259A requesting the allotment at Coeburn rather than Clinchco, Virginia. Subsequently, in accordance with the goal to optimize allotments to increase FM service, an engineering study was conducted to find an alternate channel at either location which would not preclude other proposals in the area. The study indicated Channel 297A at Coeburn would meet those requirements. Because the study was conducted on the basis of theoretical calculations it did not take into account terrain obstructions or other variables relating to site locations in other communities which would not meet the minimum distance separation requirements. Therefore, the conflict between the Corbin proposal and the Coeburn allotment was not known.

9. After a review of the comments, further studies and the close proximity of the Daniel Boone National Forest, it is apparent that siting problems exist at Corbin in a south southwest direction. Therefore, in order to give due consideration to the proposal to allot Channel 297C2 to Corbin, Kentucky, we have undertaken a further engineering study to resolve the conflict in a manner which will optimize allotments in the area and provide increased FM service to the public. The Commission did not intend to allot Channel 297C2 to Corbin with a site that was unusable. Based on the showing of siting problems for Channel 297C2, it is necessary to make a substitution of channels at Coeburn and Clinchco, Virginia. This determination is consistent with the criteria established in the *Memorandum Opinion and Order* to the *First Report and Order* (see footnote 1, *supra*) holding that the Commission shall make channel substitutions upon a showing of Commission error. Accordingly, we have

determined that the substitute allotment of Channel 259A to Coeburn and Channel 226A to Clinchco, Virgnia, will best achieve these objectives. The Coeburn allotment will resolve the short-spacing problem and provide a more favorable site restriction. The substitution of Channel 226A for Channel 259A at Clinchco, Virginia, will enable the Commission to act expeditiously to bring new FM service to the Corbin area. With respect to Dickenson's objection that a channel substitution at Clinchco, Virginia, will delay the application process, it is pointed out that regardless of the channel allotted to that community, Clinchco retains its sequence in the processing order.[7] In this regard, the community of Clinchco, Virginia is No. 49 in the processing order thus providing Dickenson ample opportunity to prepare its application prior to the window period for filing applications.

10. As noted above, recent amendments to Section 1.420(g) provide that the Commission may modify FM licenses of petitioners seeking to upgrade on existing or adjacent channels despite the unavailability of additional superior class channels to accomodate other interests. We shall allot Channel 296A and modify the license of Station WCTT-FM to specify operation on Channel 297C2 notwithstanding expressions of interest in Channel 297C2 filed by Williamsburg Broadcasting, Inc., and Patricia L. Powell. In addition, we have determined that: (1) Channel 258C2 can be allotted to Corbin, Kentucky, and the license of Station WYGO-FM, Channel 257A, modified to specify operation on the new channel; (2) Channel 259A can be allotted to Coeburn, Virginia, in lieu of Channel 297A, with a site restriction of 3 kilometers (1.8 miles) north; (3) Channel 226A can be allotted to Clinchco, Virgnia, in lieu of Channel 259A with a site restriction of 4.1 kilometers (2.6 miles) northwest; and (4) Channel 274A can be allotted to Jellico, Tennessee. The actions satisfy all channel requirements in this matter.

Vergennes, Vermont

11. The counterproposal of Radio Vergennes, Inc. ("RVI"), licensee of Station WIZN(FM), Channel 292A, Vergennes, Vermont, requested the allotment of Channel 294C2 and modification of its license to specify operation on the new channel. As noted in the *Further Notice*, this proposal conflicted with the Commission's proposal to allot Channel 294A to Plattsburgh, New York, or to

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[7] See Public Notice of May 8, 1985, regarding the Commission's policy on the change of channel allotment not affecting the numerical sequence of the community in the processing order.

Granville, New York. In the *First Report and Order, supra,* Channel 278A was allotted to Plattsburgh instead of Channel 294A. Granville was subsequently dropped from consideration since no interest was expressed. In response to the *Further Notice* comments were filed by: RVI reiterating its interest in the new channel; Lewis Creek Broadcasters ("Lewis"); Paul Bosshold; Radio Barre, Inc. ("Radio Barre"), licensee of Station WORK(FM) Channel 296A, Barre, Vermont.[8] Reply comments were filed by RVI and Radio Barre.

12. Lewis states that the proposed modification of license for Station WIZN(FM) may not be implemented because he has indicated an interest in applying for Channel 294C2 if allotted. RVI indicates that it desires to seek a waiver of the spacing rules in order to utilize its current site for the proposed Class C2 station. Radio Barre states it strongly opposes the grant of a waiver permitting a short spacing to its station which would result from the proposed upgrade of WIZN(FM) from its present transmitter site.

13. We have considered RVI's proposal and believe that it would be in the public interest to make the proposed substitution. Although Radio Barre opposes the proposed upgrades we believe its concerns are premature. Channel 294C2 complies with the Commission's minimum spacing requirements. See, Section 73.207 of the Commission's Rules. However, if RVI applies to use a site which is short spaced to WORK(FM), then it will have to request a waiver at the application stage. As noted above, it is no longer necessary to demonstrate the availability of an additional equivalent class of channel. Therefore, notwithstanding the expressions of interest by Lewis, and Bosshold, we shall modify the license of Station WIZN(FM) to specify operation on Channel 294C2.

LaCrosse, Wisconsin

14. The counterproposal of May Broadcasting Company ("May") licensee of Station WSPL-FM, Channel 240A, LaCrosse, Wisconsin, proposed the allotment of Channel 239C2 and modification of its license to specify operation on the new channel. May filed comments reiterating its interest while Donald G. Zinke ("Zinke"), Bay Broadcasting, Inc. ("Bay") and Thomas E. Ingstad

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[8] Radio Barre also sought to upgrade its facilities and suggested two counterproposals which would eliminate a short spacing with the current Radio Barre site on the proposed new channels. However, these proposals do not conflict with the Vergennes proposals and are under consideration in a separate proceeding (MM Docket No. 85-223, 50 Fed. Reg. 30974, published July 31, 1985).

("Ingstad"), licensee of Station WLXR-FM, Channel 285A, LaCrosse, Wisconsin, filed expressions of interest in the Class C2 channel.

15. As we stated in making the modifications in *Corbin, Kentucky, supra.* and in *Vergennes, Vermont, supra.*, proponents are not required to demonstrate the availability of an additional equivalent class of channel. Further, as previously noted, expressions of interest will no longer be entertained in this type of situation. Therefore, it is possible to modify the license of Station WSPL-FM to specify Channel 239C2 as requested.

Jacksonville and Kinston, North Carolina

16. In the *Further Notice* the Commission also sought comments on the proposal of Farmers Broadcasting Service ("Farmers") to allocate Channel 254A to Kinston, North Carolina, as the community's third local FM service, or to allocate either Channel 254A or 254C1 to Jacksonville, North Carolina, as its third local FM service as originally proposed in the *Notice*. Comments in favor of the Jacksonville allotment were filed by James Capers, Jr. ("Capers"), A. Thomas Joyner ("Joyner") and James C. Jarman ("Jarman"). Farmers submitted comments supporting its Kinston request. A separate petition was filed by Marine Broadcasting Corporation.[9] Reply comments were filed by Harold Foster ("Foster") supporting the Jacksonville allotment, and by Capers and Farmers.

17. Winfas, Inc., licensee of Station WRCM(FM), Channel 221A, at Jacksonville, North Carolina, filed a counterproposal requesting that it license be modified to specify operation on Channel 254C2 and that Channel 222C2 be allocated to accomodate other interested parties in compliance with Section 1.420(g) of the Commission's Rules. Unlike the previous cases in this

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[9] Marine Broadcasting Corporation ("Marine") filed a petition for rule making requesting the substitution of Channel 289C2 for Channel 288A at Jacksonville, North Carolina, and the modification of its license for Station WXQR to specify operation on the higher powered channel. In order to effectuate the substitution at Jacksonville, Marine also requested the substitution of Channel 222A for Channel 287A at Wilmington, North Carolina, and Channel 299A for Channel 287A at Fairbluff, North Carolina, both having been allocated in the *First Report and Order* herein, 50 Fed. Reg. 3514, published January 22, 1985. The petition was returned as unacceptable for rule making based on the Commission's decision not to routinely substitute docket 84-231 channel allotments. See *Memorandum Opinion and Order*, 50 Fed. Reg. 47391, published November 18, 1985. The Commission now has pending a petition for reconsideration filed by Marine. In order to avoid a conflict between Marine's proposal and the allocation of Channel 222C2 at Jacksonville, in the subject reconsideration, we will consider 283A as a proposed replacement channel at Wilmington.

Fourth Report and Order, this counterproposal presents a non-adjacent channel upgrade request which can be processed under current Commission policy as set forth in Section 1.420(g) (the "Helena" procedure) without relying on the recent amendment to that section in MM Docket 85-313. Winfas states that the modification of its license would permit Station WRCM to serve many more persons than currently possible with its Class A facilities.

18. We believe both communities could benefit frm the additional radio service. However, there is no necessity for a comparison of community needs to be made.[10] We have found that Channel 275A can be allotted to Kinston in compliance with the Commisson's mileage separation requirements with a site restriction of 8.3 kilometers (5.1 miles) west, and contingent upon grant of the application of Station WZYC, Newport, North Carolina, requesting to move its transmitter site and reclassification of its channel as a C1 (BPH-860106IA).[11] Channel 254C2 can be allocated to Jacksonville in compliance with the Commission's mileage separation requirements with a site restriction of 6.9 kilometers (4.3 miles) southeast to avoid short-spacing to co-channel Station WKSI-FM at Greensboro, North Carolina. Contrary to what was stated in the *Further Notice, supra.*, Channel 254C1 is unavailable for allotment to Jacksonville because the site for Channel 254C1 which complies with spacing requirements is offshore. As an alternative, Channel 222C2 can be allocated to Jacksonville if Channel 221A is deleted, with a site restriction of 12.1 kilometers (7.5 miles) southeast to avoid a short-spacing to the construction permits of Station WYFL at Henderson, North Carolina, and Station WKRR at Asheboro, North Carolina.

19. As noted above, licensees seeking to upgrade their facilities generally request that they be modified to specify an adjacent channel where possible, since no competing interest in use of the channel need be considered in light of the Commission's recent decision in MM Docket No. 85-313. Here, however, Winfas has specifically requested that its license be modified to specify Channel 254C2 even though it is aware that an adjacent channel

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[10] As stated in the *Further Notice* the proposed allocation of Channel 254A at Kinston was based on Station WRQK, Greensboro, North Carolina (now WKSI-FM), waiving its 16 kilometer buffer zone protection. However, by letter of August 16, 1985, Robins Communications, licensee of Station WKSI-FM, has withdrawn the earlier waiver. Therefore, Channel 254A cannot be allocated to Kinston in compliance with the buffer zone protection accorded to the Greensboro station.

[11] Station WZYC's application was granted on February 11, 1986.

upgrade is possible. Since we have not been provided with any technical differences in use of the two channels, we believe that Winfas' proposal should be granted as requested. The modification complies with Section 1.420(g) of the Commission's Rules in that an additional equivalent channel is available for application by other interested parties. Therefore, we will modify the license of Station WRCM to specify operation on Channel 254C2 in lieu of its present Channel 221A, which will be deleted from the Table of Allotments, and Channel 222C2 will be allocated instead.

20. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 16, 1986, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules IS AMENDED with respect to the communities listed below to read as follows:

City	*Channel No.*
Corbin, Kentucky	258C2, 297C2
Jacksonville, North Carolina	222C2, 254C2, 288A
Kinston, North Carolina	236, 249A, 275A
Jellico, Tennessee	274A
Vergennes, Vermont	294C2
Clinchco, Virginia	226A
Coeburn, Virginia	259A
LaCrosse, Wisconsin	227, 239C2, 285A

21. IT IS FURTHER ORDERED, That in accordance with the Public Notice of May 8, 1985, applications will be accepted for:

Channel 274A, Jellico, Tennessee in numerical sequence No. 16;
Channel 226A, Clinchco, Virginia in numerical sequence No. 49;
Channel 259A, Coeburn, Virginia in numerical sequence No. 29;
Channel 222C2, Jacksonville, North Carolina in numerical sequence No. 58;
Channel 275A, Kinston, North Carolina in numerical sequence No. 13.

22. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license of Crawford Broadcasting, Inc. for Station WCTT-FM, Corbin, Kentucky, IS MODIFIED to specify operation on Channel 297C2 in lieu of Channel 296A; the license of Vernon-McCreery Broadcasting, Inc. for Station WYGO-FM, Corbin, Kentucky IS MODIFIED to specify operation on Channel 258C2 in lieu of Channel 257A; the license of Station WIZN(FM), Vergennes, Vermont IS MODIFIED to specify operation on Channel 294C2 in lieu of Channel 292A; the license of Station WSPL-FM, LaCrosse, Wisconsin, IS MODIFIED, to specify operation on Channel

239C2 in lieu of Channel 240A and the license of Station WRCM(FM), Jacksonville, North Carolina, IS MODIFIED, to specify operation on 254C2 in lieu of Channel 221A. The above license modifications are subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (Form 301) specifying the new facilities.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

23. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Fourth Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

(1) Crawford Broadcasting Inc.
105 North Kentucky Avenue
Corbin, Kentucky 40701

(2) David G. Rozzelle, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

(3) Vernon-McCreery Broadcasting, Inc.
P.O. Box 742
Corbin, Kentucky 40701

(4) May Broadcasting Company
c/o James A. McKenna, Jr., Esq.
McKenna, Wilkinson & Kittner
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

(5) Radio Vergennes, Inc.
c/o William M. Barnard
Kenkel, Barnard & Edmundson
1220 19th Street, N.W., Suite 202
Washington, D.C. 20036

(6) Winfas, Inc.
c/o Keith & Smithwick
1320 Westgate Drive
Winston-Salem, N.C. 27103

24. IT IS FURTHER ORDERED, That the petition entitled "Comments and Counterproposals on Further Notice of Proposed

Rule Making" filed by Barbourville Community Broadcasting, Inc. is unacceptable for filing and IS DISMISSED.

25. IT IS FURTHER ORDERED, that the petition entitled "Petition for Reconsideration" filed by Crawford Broadcasting, Inc. and accepted for filing as a counterproposal (RM-4905) IS GRANTED IN PART and otherwise DISMISSED AS MOOT.

26. IT IS FURTHER ORDERED, That the petition entitled "Contingent Dismissal of Proposal" filed by Crawford Broadcasting, Inc. IS DISMISSED as moot.

27. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. For further information concerning this proceeding please contact Arthur Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM TRICARICO, *Secretary*

Application, Denial
Main Studio Location, See Studio
Petition for Reconsideration, See Reconsideration

Petition for Reconsideration **of Commission's** ***Order*** **FCC 85-234, adopted April 30, 1985. Commission had already considered and rejected all arguments presented in proceeding. Applicant has failed to make sufficient showing required by Section 73.1125(a)(3).**
—*Forus FM B/cing N.Y. Inc.*

FCC 86-171

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re: Application of

FORUS FM BROADCASTING Of
NEW YORK, INC., (WOIV(FM))
DERUYTER, NEW YORK

For Authorization to Locate Main
Studio Outside Community of
License Pursuant to 57 C.F.R.
§ 73.1125(a)(3)

File No.
BMLH-81120AU

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1986; Released: April 17, 1986

BY THE COMMISSION:

1. The Commission has before it the instant petition for reconsideration, filed on June 3, 1985, by Forus FM Broadcasting of New York, Inc. ("Forus"), the licensee of FM Station WOIV, DeRuyter, New York. Forus seeks reconsideration of the Commission's *Order*, FCC 85-234 (Mimeo No. 35793), Adopted April 30, 1985 and Released May 3, 1985. The *Order, supra*, denied — without specifying reasons — Forus' application for review of April 2, 1984, which was prompted by the Mass Meida Bureau's refusal to grant its request to relocate its main studiooutside the community of license pursuant to 47 C.F.R. § 73.1125(a)(3).

2. Forus' instant petition states there were six "points" it submitted in support of both its initial request and its application for review that were never addressed by either the Bureau initially or by the Commission in its disposition of the application for review. These "other points" are:

> 1) The miniscule (542) and declining population of the village of DeRuyter [the community of license].
>
> 2) The fact that the requested studio location is 43% closer to DeRuyter than was the studio used by Petitioner's predecessor.
>
> 3) The inappositeness of the Bureau's reliance on the Commission's [decision in] *Suburban Community Policy, the Berwick Doctrine, etc.*, (53 RR 2d 681)
>
> 4) The fact that the requested change is not in contravention of Section 307(b) [of the Communication's Act, 47 U.S.C. § 307(b)].
>
> 5) The failure to support the contention that the rationale for the previously granted waiver disappeared entirely when the station was no longer part of a network.
>
> 6) The fact that no change whatsoever has been shown in any pertinent public interest factor to require that the station now, for the first time, locate its main studio at DeRuyter.

3. Forus contends that "None of the above questions were addressed by either of the two actions from which review was sought; and none were addressed by the Commission in denying the instant Application for Review .... [B]asic procedural due process requires that Petitioner's arguments be addressed *at some point in the administrative proceeding and this has not occurred* [emphasis in original]."

4. In denying Forus' application for review, the Commission agreed with the Bureau that Forus had not made the good-cause showing required by 47 C.F.R. § 73.1125 and that Forus had not cited any error of law or fact which would justify or necessitate review of the Bureau's ruling. Reexamination of the staff's action of March 1, 1984, upon which the Commission relied in issuing its ruling without specifying reasons, clearly indicates that the points raised by Forus were addressed by the Bureau.

5. Our response to Forus' references to the "miniscule and declining" population of DeRuyter (point one) and the closer proximity of the proposed studio to DeRuyter (point two) indicated: (a) that the size of a community of license has no bearing or relation to the requirements of our main-studio rules; and (b) that the distance to East Syracuse/Polksville (the site of

the proposed studio) from DeRuyter is less than the distance to Ithaca (the site of the prior licensee's main studio) from DeRuyter is insufficient reason to warrant grant of Forus' proposal. *See* the Audio Services Division's letter of March 1, 1984 ("*Letter*"), at page 4, para. 2. With regard to the Bureau's reliance on *Suburban, supra* (point three), we stated, quoting *Suburban*, that, "we . . . examine applications to determine compliance with our licensing rules [and that such] compliance will result in the . . . *location of the main studio in that community* [emphasis added in letter quote]." *Letter* at page 4, para. 2.

6. We addressed Forus' § 307(b) argument (point four) by indicating that the Act requires us to provide a fair, efficient and equitable distribution of radio service and that § 307(b) concerns encompass main studios, their locatons, and the orgination of programming from them. *Letter* at page 4, para. 2.

7. Forus also alleges that the Bureau failed to support its contention that the rationale for the previously granted waiver disappeared when the station was no longer part of a network (point five). This is not true. In its initial decision, the Bureau took cognizance of the history of the five-station network. The Northeast Radio Network provide a unique FM service to a major, rural portion of upstate New York. With the exception of WEIV, the Ithaca outlet, the stations were assigned to rural areas for maximum area coverage. All programming originated from WEIV-FM and was fed by wire to the four sister stations, which operated essentially as satellites. This mode of operation had been approved since 1947, when the stations were originally licensed, on the ground that the stations could not survive as independent, rural FM outlets. The Commission accepted the view that an important service was being rendered which could not be continued were the network dismembered and the stations forced to rely solely on their respective communities for economic support. However, when the previous licensee dissolved the network and sold the individual stations to the present licensees, the rationale for permitting continued satellite operation disappeared. *Letter* at page 3, para. 3.

8. Forus' final contention is that no change had been shown in any pertinent public interest factor that should require WOIV for the first time to locate its main studio at DeRuyter (point six). In reaching our previous determination in this matter, each factor advanced by Forus in support of its application was considered. The basis of our decision to deny Forus' main-studio relocation request was that "good cause" had not been shown and that its

proposal was inconsistent with the public interest. *Letter in toto.*

9. In view of the foregoing, reexamination of our disposition of the application for review reveals that we have already considered and rejected all arguments presented by Forus in the course of this proceeding. In this regard, Forus has failed to make a sufficient showing required by Section 73.1125(a)(3). Also, Forus has thus failed to show, pursuant to 47 C.F.R. § 1.106, how reconsideration of our *Order* is warranted.

10. Accordingly, IT IS ORDERED, That the petition for reconsideration filed on June 3, 1985, by Forus FM Broadcasting of New York, Inc. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Frequency, Use of
Rule Making, Notice of Proposed
Spectrum, See Frequency

Notice of Proposed Rulemaking adopted regarding petition requesting that radio local area networks be permitted to share the 1700-1710 mHz frequency band with the Meteorological Satellite Service on a secondary basis. Proposal designed with the objective of permitting more entities to take advantage of digital technology.
—*Local Area Networks*
PR Docket No. 86-174

FCC 86-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2 and 94 of the Commission's Rules to Accommodate Radio Local Area Network Stations in the 1700-1710 MHz Band	PR Docket No. 86-174 RM-5072

NOTICE OF PROPOSED RULE MAKING

Adopted: May 1, 1986; Released: May 19, 1986

BY THE COMMISSION:

1. On June 14, 1985, Motorola, Inc. (Motorola) petitioned the Commission to amend Parts 2 and 94 of its Rules and Regulations to provide spectrum for radio local area networks (LANs). Specifically, the petition requests that radio LAN's be permitted to share, on a secondary basis, the 1700-1710 MHz frequency band with the Meteorological Satellite Service.

2. Motorola states that personal computers and desktop terminals are becoming commonplace in both government and industry offices and are normally connected by wire or cable to form local area networks. Current hard-wire interconnection techniques do not permit office and employee relocation to be performed in an efficient and cost effective manner. The petitioner further states

that a radio LAN would allow users to move computing machines without the expense or disruption of moving wires and cables, and therefore would allow more companies to take advantage of computer technology. Because of this, the petitioner indicates it has developed a wireless approach which can provide flexibility and cost effectiveness that is required in the local area networking environment. A radio LAN is claimed to be functionally equivalent to a wire-based LAN without the initial cable installation costs and rewiring costs associated with any LAN or terminal relocation. Thus, allocation of spectrum to permit use of radio LANs would be in the public interest.

3. Motorola also recommends that radio LAN operation be established as a licensed Part 94 service utilizing the 1700–1710 MHz band, that frequency coordination be required, and that each radio LAN system be licensed at a prescribed set of coordinates with a zone of operation permitted around these coordinates. Additionally, the petitioner states that to encourage the development of a competitive and flexible technical environment, only the technical standards necessary to control interference should be specified. This would allow radio LAN technology to grow in response to market forces.

4. The National Research Council submitted the only set of comments on the petition. They took no position on an allocation of the 1700–1710 MHz band for radio LANs, stating only their opposition to a statement in the petition which mentioned the 1400–1427 MHz radioastronomy band, among others, as a candidate band for radio LAN operations.

5. After reviewing the petition and comments, there appear to be merit in permitting use of this band for radio LAN systems. However, we are proposing that this spectrum not be specifically limited to devices that interface information processing equipment, such as office personal computers and desktop terminals, to a radio channel nor limited to the specific application of a radio LAN envisioned by Motorola. The radio LAN concept could apply to applications that are not solely office-related. Non-radio LANs now support low and high speed data, digital voice, facsimile, and video. Moreover, most local networks interface with other networks and information services. The existence of these many uses of digital networks and the increasing rapid emergence of hardware that can support them are indications of the breadth of services which may benefit from access to this allocation. Additionally, this spectrum could be used in ways that do not fit the description of a local area network. Other non-office related

applications could be developed that do not involve interfacing with terminals, information services, or other networks. Therefore, the use of the 1700–1710 MHz band will not be limited to radio LANs but open to other related systems that may utilize similar interconnection techniques.[1]

6. The 1700–1710 MHz band is allocated on a primary basis for meteorological satellite and government fixed station use. It is also available for non-government fixed use on a secondary basis. There is little present use of this spectrum by either government or non-government fixed users. Currently, there are 29 government receive-only meteorological satellite earth terminals in use. If radio LAN-type systems are to be accommodated in this band, these government stations will require interference protection. Therefore, to prevent potential interference to government fixed stations and earth terminals operating in the band, all non-government fixed applications for use of the 1700–1710 MHz band will be subject to existing coordination procedures between the FCC and the National Telecommunication and Information Administration's Interdepartmental Radio Advisory Committee (IRAC). Applicants requesting use of this band for systems that are within 100 kilometers (km) of any of the earth stations listed in Section 94.97(c) will be required to submit a technical analysis stating the expected signal level at the earth station site. We request comments on the appropriateness of this distance. In addition to the government earth stations, there are an unknown number of unlicensed, private, receive-only meteorological satellite earth stations operating in portions of this band. Since the Commission has no record of their locations, we point out that these existing earth stations, as well as any future earth stations, have primary status. Non-government authorizations in this band may be conditioned to reflect this situation.[2]

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[1] We note that STS ("shared telecommunications services" or "shared tenant service") systems employ computer technologies and various communications media to provide interexchange and local telecommunications services and, in some cases, a variety of enhanced services. In an STS system, the occupants of a multitenant building, a building complex, or a real estate development tract use voice and data equipment located on their premises to connect with a shared PBX or other electronic switching device provided by the building owner, a user association, or an outside contractor. Some of the uses that might ultimately be made of LAN-type systems, whether radio or wire, may parallel, in function, STS services. We have recently initiated a proceeding to obtain information regarding the economics and technical characteristics of STS systems and their relationship to local exchange services. *See Notice of Inquiry* (FCC 86-26) in CC Docket No. 86-9, released January 27, 1986, 102 FCC 2d 1421 (1986).

[2] The National Telecommunications and Information Administration has re-

7. Factors such as transmitter effective radiated power, height above ground of the radio LAN system, and shielding provided by the environment (i.e. the type of building and equipment location within the building), would affect co-channel frequency assignments. Therefore, we are also proposing that each system be licensed at a prescribed set of geographic coordinates with a zone of operation permitted around these coordinates. As an example, a system may have a transmitter operating at 1705 MHz with an effective radiated power of 100 mw (+20 dBm) and a typical receiver sensitivity of −86 dBm. The free space loss between the transmitter and receiver would be 106 db (the difference between +20 and −86 dBm). Using the path loss equation, Path loss = 36.6 dB + 20 Log F (MHz) +20 Log D (miles) yields a separation distance of 1.73 miles for free space attenuation. When the path loss consists of both free space and other sources of attention such as building losses, the separation between a transmitter of one system and a co-channel receiver of another system varies as follows:

Assumed building loss	*Separation*
0 dB (free space)	9140 feet
20 dB	914 feet
30 dB	289 feet
40 dB	91 feet

Since it is expected that most radio LANs will be located in large office buildings, we have assumed an operating area radius of 500 feet to be reasonable. A conservative building loss factor of 20 dB dictates that a transmitter of one system be separated from a co-channel receiver of another system by 914 feet (rounded to 1000 feet). Therefore, if a 500 foot zone of operation is assumed around a prescribed set of coordinates, a 1000 foot separation between two co-channel operating areas would result in a separation distance between co-channel assignment of 2000 feet. With the power limitation indicated, we are therefore proposing to require a minimum of 2000 feet between co-channel assignments. However, we realize that due to the uncertainties of the environment in which the system may operate, it may also be possible to obtain closer co-channel spacing. We will therefore permit closer spaçing if an applicant obtains permission from all affected co-channel licensees. We ask for comments on our proposed

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viewed this *Notice*. Its comments, with evaluations of radio LAN interference to government fixed and satellite earth stations, are available for inspection in the Docket file.

interference criteria between radio LAN or radio LAN type systems. Additionally, to further minimize the potential of interference from radio LAN or LAN type systems, we are restricting the operation of each such system to within a single building. Radio LAN frequencies may not be used for communications between components of a system, or between separate systems when such components or systems are located in different buildings.

8. The bandwidth requirements for systems are dependent upon the number of terminals and the type of data transmitted. We expect that some systems may not require the full 10 megahertz available in the 1700–1710 MHz band while others, because of the type of modulation, type of data, and system size, may require the entire 10 megahertz bandwidth. To authorize all applicants a 10 megahertz bandwidth could be wasteful of spectrum. It would appear then that a channeling plan may be required. Such a plan might consist of ten 1 megahertz channels of five 2 megahertz channels, as examples. Applicants would be required to justify their bandwidth request and would be authorized one or more contiguous channels depending upon the system requirement. In the Appendix we are proposing a channeling plan consisting of five 2 megahertz channels, but we are requesting comments suggesting alternative channeling plans, assignment procedures, and equipment frequency tolerances.

9. Since the proposed use of the 1700–1710 MHz band is for newly developed radio LAN systems and for others yet unknown and undeveloped, we do not know what technical specifications these systems will employ. Therefore, we do not intend to specify modulation techniques used for such systems. This should be a marketplace decision. However, we are proposing to retain the present out-of-band emission limitations of Section 94.71 for the new 1700–1710 frequency band.

10. The petitioner asserts that an equivalent isotropic radiated power (EIRP) of 100 milliwatts (−10 dBw) should be sufficient to accommodate reasonably-sized radio LANs. It appears that this low power, coupled with a specified co-channel separation distance, would allow interference free operation. Also, since we are specifying the power limitation in EIRP, omnidirectional or directional antennas may be utilized. However, we are requesting comments as to the appropriateness of the proposed EIRP power limitation.

11. Under the proposed rules, it would be possible to have five separate systems within each 1000 foot radius zone. If each user

were authorized the minimum 2 megahertz bandwidth, there could be 180 users per square mile. To license each user individually would severely and unnecessarily burden both our licensing resources and coordination efforts with the federal government. In a supplemental filing, Motorola raised concerns over such licensing and coordinating issues. We forsee at least two alternatives to user licensing. First, we could authorize a single licensee to use the entire 10 megahertz bandwidth in a 1000 foot radius zone. The licensee could then subdivide the 10 megahertz in whatever manner it chose to provide service to end users. Under this approach, the licensee, who might or might not be an end user, could be allowed to permit several users in the same zone to time share a frequency or part of the 10 megahertz assignment. An alternative would be to authorize several licensees to use the same 1000 foot radius zone, with the licensees cooperating in the use of the 10 megahertz in that zone. Either of these methods would significantly reduce the number of authorization that the Commission would have to issue.

12. Since the radio LAN type of operation differs significantly from the normal Part 94 operational-fixed system, it appears that frequency coordination for licensees may be necessary. We are unsure at this time what the acceptance of these types of systems will be and what coordination procedures might be needed. However, we believe that in order to manage this spectrum properly and to minimize interference, a single nationwide frequency coordinator may be desirable. We invite comments on these issues from all interested parties. Those entities interested in providing frequency coordination services for this band should submit comments discussing the issues, potential coordination problems, their solutions, proposed coordination procedures, general discussion and expected range of fees, and their qualifications to assume the role of coordinator for this frequency band. We are not proposing specific coordination rules at this time.

13. The Commission by this Notice is encouraging the development of radio local area networks. As noted above, use of the 1700-1710 MHz band for such operations would be on a secondary, non-interference basis to the primary services. We have proposed rules and procedures to minimize the potential for interference. Nonetheless, if LANS operations proliferate, as we expect they will, the potential for harmful interference to primary users will increase. If a LAN licensee interferes with primary operations, as a secondary user the licensee will have to cease operating until the interference is eliminated. We believe prospec-

tive LAN licensees must be informed that they are secondary users, so they can attempt to minimize interference and so they know that they will have to stop operating if they cause interference to primary users. The Commission could require labelling of LAN equipment and/or specifically condition each authorization. Although we are not now proposing this course of action, we invite comments on it and any other way to emphasize the issue.

14. *Initial Regulatory Flexibility Act Analysis*

I. Reason for action. This action is being taken to permit radio local area network systems to operate in the 1700–1710 MHz band under Part 94 of the Commission Rules.

II. Objectives. The objective of this action is to permit more entities to take advantage of digital technology since the use of radio LAN systems can have a significant economic advantage over present hardwired LANs, particularly when local area network components must be relocated.

III. Legal Bassi. This action is proposed in accordance with Sections 303(e) and 303(f) of the Communications Act of 1934, as amended, that authorizes the Commission to regulate the apparatus used by radio stations and to make such regulations as may be necessary to prevent interference between stations.

IV. Description, Potential Impact, and Number of Small Entities Affected. The rules proposed in this proceeding do not appear to create any additional economic burden on licensees. Those licensees choosing to implement radio LAN systems could benefit economically since equipment relocation costs would be reduced. Since the radio LAN concept is new, we are unable to comment on its acceptance by, or impact on, small entities.

V. Recording, Record Keeping and other Compliance Requirements. None.

VI. Federal Rules which Overlap, Duplicate, or Conflict with this Rules. None.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with the Stated Objectives. None.

15. Accordingly, NOTICE IS HEREBY GIVEN of rule making to amend Parts 2 and 94 of the Commission's Rules and Regulations, in accordance with the proposals set forth in the attached Appendix.

16. The proposed amendment of the Rules is issued pursuant to authority contained in Sections 4(i), 303(b), 303(f), 303(g), and 303(r) of the Communications Act, as amended.

17. IT IS ORDERED that the Secretary shall cause a copy of

this *Notice of Proposed Rule Making* to be served upon the Chief Counsel for Advocacy of the Small Business Administration.

18. We encourage all interested parties to respond to this *Notice of Proposed Rule Making* since such information as they may provide often forms the basis for further Commission action. For purposes of this non-restrictive notice and comment rule making proceeding, members of the public are advised that *Ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting, or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings or formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding, must prepare a written summary of that presentation. On the day of that oral presentation, a written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must also state by docket number the proceeding to which it relates. See generally, § 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

19. Pursuant to applicable procedures set out in § 1.415 of the Rules and Regulations, 47 C.F.R. § 1.415, interested persons may file comments on or before July 23, 1986, and reply comments on or before August 22, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public files and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

20. In accordance with the provisions of § 1.419 of the Rules and Regulations, 47 C.F.R. § 1.419, formal participants shall file and original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11

copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission Public Reference Room at its headquarters in Washington, D.C.

21. For further information on this proceeding, contact Eugene Thomson, Private Radio Bureau, Washington, D.C. 20554, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

It is proposed to amend Parts 2 and 94 of the Commission's Rules and Regulations as follows:

Part 2–Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

Part 94–Private Operational-Fixed Microwave Service

The authority citations for Parts 2 and 94 continue to read as follows:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

1. The Table of Frequency Allocations in § 2.106 is amended by adding the Private Operational-Fixed Microwave Service to column (6), Rule part(s), for the 1700-1710 MHz frequency band.

2.106 Table of Frequency Allocations

United States table		FCC use designators	
Government	Non-Government	Rule part(s) (6)	Special-use frequencies (7)
Allocation MHz (4)	Allocation MHz (5)		
	*	* *	* *
1700–1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth). 671 722 G118	1700–1710 METEOROLOGICAL-SATELLITE (space-to-Earth). Fixed. 671 722	Private Operational-Fixed microwave (94)	

* * * * *

2. § 94.15 is amended by adding subparagraph (k) as follows:

94.15 Policy governing the assignment of frequencies.

* * * * *

(k) Applications filed for frequencies in the 1700–1710 MHz band will not be subject to the provisions of paragraphs (a) through (j) of this section.

3. § 94.61(b) is amended by adding the band 1700–1710 MHz between 960 and 1850 MHz to the table as follows:

94.61 Applicability

* * * * *

(b) ***

FREQUENCY BAND (MHz)

* * * * *

1700 to 1710 – (13)

* * * * *

4. § 94.63(b) is amended to read as follows:

94.63 Interference protection criteria for operational fixed stations.

* * * * *

(b) The interference protection criteria for operational-fixed stations, other than those licensed on frequencies set out in §§ 94.65(a) (1), 94.90, 94.91, and 94.65(m) are as follows:

* * * * *

5. A new § 94.65 (m) is added to read:

94.65 Frequencies

* * * * *

(m) 1700–1710 MHz

(l) 2 megahertz authorized channels

Transmit (receive) MHz
1701
1703
1705
1707
1709

(2) Upon adequate justification, up to 5 contiguous channels may be authorized at a single location.

6. § 94.71(b) is amended by adding the band 1700–1710 MHz between 960 and 1850 MHz to the table.

94.71 Emmission and bandwidth limitations.

* * * * *

(b) ***

Frequency band (MHz)	Maximum authorized bandwidth
	* * * * *
1700–1710	10 Megahertz
	* * * * *

7. § 94.73(a)(2) is amended by adding the band 1700–1710 MHz between 960 and 1850 MHz and footnote 7 to the table.

94.73 Power limitations

(a)(2)

Frequency band (MHz)	Maximum allowable EIRP 2/ (dBw)
	* * * * *
1700–1710	-10[7]
	* * * * *

[7] Either omnidirectional or directional antennas may be authorized.

8. A new § 94.97 is added to read:

94.97 Special provisions for the use of the 1700–1710 MHz band.

Notwithstanding any contrary provision in this part, frequencies in the 1700–1710 MHz band may be authorized subject to the following:

(a) All systems authorized in this band shall be licensed at a prescribed set of coordinates. To provide co-channel interference protection, the minimum separation between co-channel assignments shall be 2000 feet. Lesser separations will be authorized if the applicant obtains consent from affected co-channel licensees.

(b) Communications between components of a system shall be restricted to within a single building. These frequencies may not be utilized for communications between different buildings.

(c) All systems in this band shall be authorized on a secondary basis. Applicants for stations within 100 km of the following government earth station installations will submit a technical analysis stating the expected radio station signal level at the earth station coordinates.

Name Location	*Coordinates (Degrees-minutes)*	
Elmendorf AFB, AK	61–65 N	149–47 W
Gilmore Creek, AK	64–59 N	147–30 W
El Toro, CA	33–38 N	117–41 W
La Jolla, CA	32–52 N	117–15 W
Mc Clellan AFB, CA	38–40 N	121–23 W
Monterey, CA	36–35 N	121–55 W
Point Mugu, CA	34–09 N	119–05 W
Redwood City, CA	37–30 N	122–14 W
San Diego, CA	32–45 N	117–10 W
Tustin, CA	33–43 N	117–48 W
Lowry AFB, CO	39–43 N	104–53 W
Macdill AFB, FL	27–51 N	82–28 W

Nimitz Hill, GU	**13-27 N**	**144-47 E**
Hickam AFB, HI	**21-23 N**	**157-58 W**
Kaneohe Bay, HI	**21-29 N**	**157-46 W**
Pearl Harbor, HI	**20-29 N**	**158-00 W**
Chanute AFB, IL	**40-18 N**	**88-09 W**
Indianapolis, IN	**39-45 N**	**86-10 W**
Greenbelt, MD	**39-00 N**	**76-51 W**
Bay St. Louis, MS	**30-19 N**	**89-21 W**
Cherry Point, NC	**34-55 N**	**76-53 W**
Offutt AFB, NE	**41-08 N**	**95-55 W**
Beaufort, SC	**32-26 N**	**80-40 W**
New River, SC	**34-42 N**	**77-26 W**
Norfolk, VA	**36-54 N**	**76-18 W**
Wallops Island, VA	**37-57 N**	**75-28 W**
Sioux Falls, SD	**43-44 N**	**96-38 W**
Vancouver, BC	**49-15 N**	**123-15 W**
Toronto, ONT	**43-45 N**	**79-29 W**

Acquisition
Control, Transfer of

Memorandum Opinion and Order adopted regarding the request of Macfadden Acquisition Corp. for the issuance of a special temporary authority to a trustee, denied, and a motion to Dismiss or Deny, granted to an extent, and contingent motion for stay dismissed, filed by John Blair and Company in this matter concerning Macfadden's intent to acquire control of Blair by tender offer.
—_Macfadden Acquisition Corp._

FCC 86-255

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of:	
Macfadden Acquisition Corp.	File Nos. BTC-860422K4, K6, K8 and K10 BTCH-860422K5, K7, K9 and K11 BTCCT-860422LN, LO, LR, LT, and LU
For Commission Consent to a Transfer of Control of John Blair & Company	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1986; Released: May 19, 1986

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER PATRICK CONCURRING AND ISSUING A STATEMENT

Introduction

1. Macfadden Acquisition Corp. (Macfadden) seeks to acquire control of John Blair & Company (Blair) by tender offer. We now

consider: (1) the information set out in the applications identified in the caption; (2) a related request by Macfadden seeking the grant of a special temporary authorization (STA) to a trustee to enable him to exercise control of Blair's FCC-licensed facilities during the interim period while Macfadden's qualifications are under consideration; (3) Blair's Motion to Dismiss or Deny, filed May 6, 1986; (4) an Opposition filed May 9, 1986, by Macfadden; (5) a Reply filed May 12, 1986, by Blair; (6) Blair's contingent motion for stay filed May 12, 1986; (7) comments of the proposed trustee filed May 13, 1986; and (8) Macfadden's May 13, 1986, Opposition to the contingent motion for stay.[1] Blair's motion to permit the filing of an additional pleading is hereby denied, in the absence of a sufficient showing in the circumstances presented.

2. Blair engages in many business activities not licensed by the Commission, including direct mail marketing services, printing, sales representation of broadcast stations, and television program production and distribution. In addition, Blair holds Commission licenses for 13 broadcast stations, either directly or through wholly owned subsidiaries. These are KSBW-TV, Salinas, California (channel 8, NBC); KSBY-TV, San Luis Obispo, California (channel 6, NBC); WSCV(TV), Fort Lauderdale, Florida (channel 51, Ind.); KOKH-TV, Oklahoma City, Oklahoma (channel 25, Ind.); WKAQ-TV, San Juan, Puerto Rico (channel 2, Ind.); WFLA(AM) and WPDS(FM) Tampa, Florida; WIBC(AM) and WEAG(FM), Indinapolis, Indiana; WHDH(AM) and WZOU(FM), Boston, Mas-

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[1] We have also received joint comments filed May 8, 1986, by the Office of Communications of the United Church of Christ, Action for Children's Television and the National Organization for Women Legal Defense and Education Fund. The joint commenters support, in general terms, Blair's position in this proceeding, and also resubmit 20 pages excerpted from thier comments in MM Docket No. 85-218, the proceeding that led to our policy statement in *Tender Offers and Proxy Contests*, 59 R.R. 2d 1536 (1986) ("*Policy Statement*"). To the extent that the joint commenters wish further consideration of their contentions in Docket 85-218, they should have done so in that context, not in this adjudicatory proceeding. Moreover, they have not directed us to any portions of their comments in Docket 85-218 that they believe are particularly relevant to the case now before us, and we are not required to guess their intentions. *WAIT Radio, Inc. v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Finally, the trustee in this case is pledged to maintain the *status quo* of the management and operation of the Blair stations. Thus, the fact that the joint commenters have members who reside in areas served by Blair stations is insufficient to establish that their interests will be adversely affected or that they will otherwise be aggrieved by the proposed operation of the stations by the trustee. Although we always appreciate and benefit from the comments of nonprofit organizations that participate in our proceedings, we do not believe that further consideration of the joint comments in this adjudicatory case is warranted, for all the reasons stated above.

sachusets; and KVIX(AM) and KVIL(FM), Highland Park, Texas.[2]

3. Prior Commission consent to the transfer of control of all of the licensed stations must be obtained under section 310(d) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 310(d). In the context of this hostile offer, Macfadden asks us to approve, under the statute, a two-step procedure for acquiring control of Blair. The first step entails the grant of an STA to a trustee to permit the collection and purchase of the tendered shares and to operate the licensed facilities, subject to specified conditions. If the tender offer is successful, the second step would be consideration of the offeror's qualifications under the formal procedures specified in section 309(d) of the Act. We permitted the use of this two-step procedure in *One Two Corporation*, 58 R.R.2d 924 (1985), and in *L. P Media, Inc.*, 102 F.C.C.2d 1276 (1985).[3] Further, because of increased activity and interest in the areas of tender offers and proxy contests, we issued a *Notice of Inquiry* on those subjects, FCC 85-349, released August 20, 1985, and subsequently adopted the *Policy Statement*, 59 R.R.2d 1536 (1986), which reinforced and refined the rulings in the adjudicatory cases. These decisions will provide guidance in the resolution of the case before us. For reasons that will be set out below, we have concluded that there are aspects of the proposal that bar the grant of an STA. In order to provide further guidance to interested parties, on the novel matters set out in Macfadden's proposal, we shall address all of the issues raised.

The Applicant's Proposal

4. Macfadden is a wholly owned subsidiary of Macfadden Holdings, Inc. Macfadden and its parent now own about 11.4 percent of Blair's stock, although that percentage may be diluted by Blair's pending offer to exchange stock for certain debtinstruments. Macfadden seeks control by making a $25-per-share tender

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[2] Blair also controls 11 television translator stations. Eight of these are in Puerto Rico: W09AT, Fajardo; W22AB, Mayaguez; W32AA, Aguadilla; W42AA, Yauco; W70AW, Utuado; W72AO, Marico; W82AL, Adjuntas; and W83AO, Jayuya. The three remaining translators are K13GS, Carmel Valley Village and K59CD, Santa Barbara, California, and K55DN, Ardmore, Oklahoma. Finally, Blair controls various nonbroadcast licenses in the Business and Industrial Radio Services, Private Operational Fixed Microwave Service, and common carrier earth stations licensed for private use.

[3] The effort of Turner Broadcasting System, Inc. to acquire control of CBS Inc. by tender offer involved the use of the standard, long-form review. The applicant did not propose to use the two-step, trustee procedure. The Commission dismissed the applications in that proceeding at Turner's request, before a decision on the merits.

offer for the remainder of Blair's stock. Shareholders could have withdrawn any tendered shares by midnight, May 12, and the offer expires at midnight, May 19, 1986, unless extended. The proposed trustee will purchase the shares, if enough are tendered to establish control, remove all of Blair's incumbent Directors, and reduce the size of the Board to three. Two of the new Directors to be elected will be Macfadden principals Peter J. Callahan and Michael J. Boylan. The third Director will be Macfadden's designated voting trustee.[4] The new Board will then promptly sell most of Blair's nonbroadcast businesses. Macfadden plans to retain the broadcast operations. Pending action on the long-form applications, the trustee will be designated as a committee of one (the "Broadcast Committee") to oversee operation of the licensed facilities under an STA and subject to the terms of the trust agreement.

5. The proposed trustee is the Honorable Hugh L. Carey, former U.S. Congressman and former Governor of the State of New York. The trust agreement states that Mr. Carey does not, and will not, have any direct or indirect business or familial relationships with Macfadden or any of its officers, directors, employees, shareholders or affiliates. Under the trust agreement, if enough shares are tendered to give Macfadden control, all acquired shares will be held by the trustee, as well as the shares already controlled by Macfadden. The shares, however, may be pledged as security to a financial institution for a loan to acquire the stock. All voting rights will be retained by the trustee. In his position as the designated Broadcast Committee of the new, three-member Board, the trustee will have "exclusive, sole, and complete managerial responsibility" for the FCC-licensed facilities. The trustee intends to maintain the *status quo* with respect to the management and operation of the licensed facilities. Specifically, under the trust, he "shall endeavor to maintain the continuity of [Blair's] broadcast practices and operations and to avoid significant departures in such practices and operation."[5]

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[4] MacFadden, its parent and principals have no attributable interests in any cable television systems, daily newspapers or broadcast stations, except those stations now licensed to Blair. Further, Blair's broadcast stations include no radio/television combinations in the same market. Accordingly, MacFadden's purchase of Blair presents no conflicts with the multiple- and cross ownership rules, 47 C.F.R. §§ 73.3555 and 76.501. Similarly, the proposed trustee has no interests that conflict with those rules.

[5] The trustee's position is thus consistent with Macfadden's longer term plans for the stations, as expressed in Exhibits E and F of the long-form applications. Macfadden states there that is "has no present intention of changing the programming services offered" by Blair's stations, and further

6. With regard to insulation between the trustee and Macfadden, the trust agreement provides:

> The Trustee shall further exercise his voting powers (by way of amendment to the certificate of incorporation or by-laws, if necessary) to undertake all necessary measures to assure that neither [Macfadden], any affiliate thereof, nor the directors who do not sit on the Broadcast Committee communicate, orally or in writing, any statements, inquiries, recommendations, or other communications concerning the management, operation, or corporate policy of the broadcast operations of [Blair] or its broadcast subsidiaries to the Broadcast Committee [that is, to the trustee]. The Broadcast Committee may, however, periodically report, in writing, to the full Board and to [Macfadden] on matters relating to the broadcast operation of [Blair] and its broadcast subsidiaries.

The last quoted sentence specifically includes written communications "on the maintenance of management and operations" of Blair's stations. The trustee and Macfadden may communicate with one another, in writing, as to the transfer of the acquired shares, if the long-form application is granted. The trustee may also communicate with Macfadden, again in writing, as to the solicitation, tendering and purchase of Blair stock.

7. According to the terms of the trust agreement, the trustee is required to vote to effectuate the tender offer and to oppose any actions that would be "inconsistent with or which would impede or impair the preservation of [Blair's] corporate assets or capitalization" or the successful completion of the tender offer. The new Board is specifically empowered to dispose of Blair's nonlicensed assets. In the event that we do not ultimately grant approval of Macfadden's purchase of Blair, or if Macfadden decides not to take control, the trustee has full discretion to select another buyer and to set the terms of the sale. Any such sale, however, must be within a range of prices to be specified by Macfadden. Macfadden can select a successor trustee, in the event of Mr. Carey's resignation, incapacity to act, insolvency or death.

8. Macfadden seeks Commission approval of its acquisition of Blair using the interim trustee process because of the delay inherent in long-form review. The tender offer is now set to expire at midnight, May 19, 1986, and the 30-day waiting period specified by section 309(d) of the Act and section 73.3584 of the Rules, plus any additional time that might be required if pleadings opposing the transaction are filed, would delay Commission action well beyond the May 19 date. Although the closing date can be extended, Macfadden refers to the *Policy Statement*

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plans to continue in effect Blair's equal employment opportunity programs.

and its goals of neutrality and the avoidance of unnecessary delay. Macfadden believes that delay in this case might deprive Blair shareholders of the opportunity to benefit promptly from its tender offer.

9. In addition to the above considerations of general applicability, Macfadden believes this case presents specific reasons for using the interim trustee procedure. Blair's broadcast properties, we are told, account for only 16 percent of its total revenues and 41 percent of its assets. Blair's financial position, in Macfadden's view, is characterized by massive losses on the part of certain nonbroadcast operations, which require that some of those nonbroadcast assets be divested immediately. The most serious problem, in Macfadden's opinion, is ADVO-Systems, Inc. (Advo), a Blair subsidiary that processes third-class mail for the distribution of advertising. Blair bought Advo in 1984 for about $37 million and has since injected an additional $99 million. Macfadden states that Advo operating losses now amount to $1.5–2.0 million per month. Indeed, Macfadden states, "[s]o profoundly troubled is Advo that Macfadden's commercial banks conditioned the availability of bank financing for the acquisition upon the firm commitment that Advo be sold promptly after conclusion of the tender offer." This condition would be met by Macfadden's proposal.[6] Macfadden has, in fact, already found a buyer for Advo. Moreover, Macfadden states that its plan of financing the proposed acquisition is similar to many leveraged buys, in that the planned sale of some of the Blair subsidiaries would retire part of the indebtedness incurred in the purchase. Accordingly, Macfadden concludes, its proposal to take control and to sell Blair's nonbroadcast assets promptly conforms with marketplace reality. Macfadden acknowledges that its proposed plan to acquire Blair differs in some respects from the procedures set out in the *Policy Statement*. It states, however, that Blair is not purely a broadcast company. Macfadden believes that its trust agreement meets the principles set out in the *Policy Statement*, "while recognizing the marketplace realities which prevail in the specific instance of Blair." With this brief description of the content of Macfadden's applications in mind, we now turn to the issues raised in the pleadings.

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[6] Macfadden plans to raise $315 million to buy Blair. About $120 million of the total will be provided by a bank loan. The remainder will be provided by cash from Macfadden ($25 million) and by the sale of preferred, nonvoting stock ($25 million) and of debentures ($145 million). As noted, Macfadden will also contribute the Blair stock it already controls.

Compliance of Macfadden's Proposal with the Policy Statement

10. Two broad principles underlie our use of the two-step, trustee procedure — maintenance of the *status quo* of the target corporation and insulation of the trustee from the offeror. "[W]e expect the trustee to act, whenever possible, . . . in a manner which preserves the *status quo* and maintains the general character of the corporation." *Policy Statement*, 59 R.R.2d at 1582. A footnote accompanying that quotation referred to our decision in *One Two Corporation*, in which we stated that maintaining the *status quo* requires the trustee to "act so as to maintain the present management and operations" of the target company. 58 R.R.2d at 937. Further, we required strict insulation between the trustee and the offeror to assure that the trustee acts independently of the offeror and that the offeror does not influence or assume control of the licensed facilities before the grant of our approval under long-form procedures. *See Policy Statement*, 59 R.R.2d at 1578–80; *L. P. Media, Inc.*, 102 F.C.C.2d at 1288. Blair first asserts that Macfadden's proposal will not maintain the *status quo* and, second, that it does not insulate the trustee from Macfadden. Third, Blair contends that Macfadden has failed to establish that the circumstances presented compel a departure from the standards adopted in the *Policy Statement*.

11. *Blair's Contentions*. Blair observes that the *Policy Statement* states that an offeror may not "nominate a director as his or her representative or attempt to influence the trustee's selction of Board members." 59 R.R.2d at 1578. Blair contends that individual Board members may be replaced by the trustee only when their actions are inconsistent with "the proper discharge of the trustee's obligations." *Id.* at 1583. Further, any directors nominated by the trustee are required to be insulated from the offeror in the same manner as the trustee. *Id.* at 1579–80. Yet, Blair notes, Macfadden proposes to remove all Blair incumbent Directors and elect a new, three-member Board. Mr. Callahan, Macfadden's sole owner and Chief Executive, will be one of the new Directors and Mr. Boylan, its President, will be another. Blair concludes: "There could be no more direct or substantial violation of the Commission's requirements than the present proposal for immediate and total replacement of the incumbent board with one appointed by direction of the offeror and dominated by it."

12. Blair notes that the *Policy Statement* strictly prohibits the offeror from "either becoming involved in, or seeking to influence directly or indirectly, the operation or management of the

corporation." *Id.* at 1578. Blair asserts that Macfadden's planned immediate sale of Advo and other nonbroadcast assets is inconsistent with the quoted statement. Blair characterizes the sale of Advo as a substantial change that would eliminate all of Blair's shareholder equity, which was about $100 million at the end of 1985. Blair states that the trustee himself is barred from selling substantial assets during this tenure, because such actions would be inconsistent with his obligation to maintain the *status quo*, citing *id.* at 1582. Macfadden's proposed divestitures do not constitute, in Blair's opinion, the "limited caretaking operation of the king envisaged by the Commission." Blair additionally noted that its present corporate structure is not consistent with Macfadden's proposed bifurcation of the company into broadcast and nonbroadcast activities. For example, Blair's Television Division supervises its five television stations, and also engages in television program production and sales representation. Similarly, its Radio Division includes its radio stations and its national radio sales representative business. Accordingly, Blair believes that considerable internal restructuring of Blair's activities would be required if Macfadden's proposal is to be carried out. Such restructuring is also inconsistent with the preservation of the *status quo*, in Blair's view.

13. Blair finds the degree of insulation between the trustee and Macfadden to be insufficient on several grounds. It notes that the insulation criteria in the *Policy Statement* are in part based on the sections dealing with trust agreements in *Attribution of Ownership Interests*, 97 F.C.C.2d 997 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985) ("*Attribution*"). We concluded there that the beneficiary of a trust would be considered as holding an attributable interest in a licensee if the interest exceeded applicable benchmarks and if, among other things, the beneficiary retained the sole right to sell stock. On the other hand, the beneficiary's right to sell the stock would not make the interest attributable if the approval of the trustee were required. 97 F.C.C.2d at 1024. The trust agreement between Macfadden and the trustee provides that the trustee can sell the Blair stock he acquires: (1) if a final Commission or judicial ruling concludes that Macfadden is unqualified to acquire control of Blair; (2) if any such ruling contains conditions that Macfadden considers unacceptable; or (3) if Macfadden notifies the trustee in writing that it no longer desires to pursue the tender offer or "otherwise desires the sale" of the acquired shares. These provisions, Blair contends, go far beyond the practices permitted in the *Policy Statement*. That decision

requires the shares to remain subject to the voting trust, Blair believes, until after a Commission decision finding the offeror unqualified, citing *Policy Statement*, 59 R.R.2d at 1564 n. 128. Further, Blair quotes our statement that during our long-form review of the offeror's qualifications, "we shall not permit the offeror to exercise any control of the tendered stock nor . . . to influence . . . the actions of the independent trustee." *Id.* at 1563. Blair concludes, therefore, that the sale provisions in the trust instrument are inconsistent with the standard set our in the *Policy Statement* and with its goal of insulating the offeror from control or influence over the operation and management of the stations. Moreover, the ability to sell the acquired stock at any time, Blair believes, "opens the way to an abuse of a kind irreconcilable with any assumed public interest in the takeover process, namely, the making of hostile takeover attempts with the intent, not actually of assuming control, but rather of manipulating the price of the stock and selling at a profit."

14. Blair next focuses on Mr. Carey's position as trustee. He has represented, as did the trustees in *One Two Corporation* and in *L. P. Media, Inc.*, that he has no connection with the offeror, except through the trust agreement. This is another means by which insulation is assured. As we stated in the policy statement, "we believe it would be inappropriate for us to grant an STA to a trustee if that trustee either has any direct of indirect familial ties or business relationships, apart from the trust agreement, with the offeror, related entities or [their] principals." *Id.* at 1579. "Business relationships" are defined to include equity or debt holdings, employment relationships or positional interests such as directorships. *Id.* at 1579 n. 193. Blair notes that Mr. Carey wil charge his normal hourly fee for his services as trustee, as a member of a law firm. Blair contends that those fees will presumably go toward the firm's overhead, as well as Mr. Carey's compensation. The same law firm, Blair alleges, represents Clarendon Group, Ltd., (Clarendon) a Bermuda corporation. Blair states that subsidiaries of Clarendon have subscribed to $25 million of the debentures that are part of Macfadden's financial plan for purchasing Blair. Further, just prior to the announcement of the tender offer, according to Blair, Macfadden bought 518,000 shares of Blair stock from Clarendon subsidiaries that were represented in that transaction by Mr. Carey's law firm. The connection of Mr. Carey through the law firm with these entities is an indirect business relationship that, in Blair's view, disqualifies him under the terms of the *Policy Statement*.

15. Blair believes that even if there were no other question as to the trustee's independence, the proposed form of the new Board of Directors would, standing alone, be enough to find a lack of insulation. Blair cites our decision in *Warner Amex Cable Communications*, 75 F.C.C.2d 393 (1979) ("*Warner Amex*"), in which we noted the difficulties of Directors "compartmentalizing" their decision making. As a result, we denied a waiver, in that case, of the broadcast television/cable television cross-ownership rule, 47 C.F.R. § 76.501. Moreover, Blair alleges that there are several responsibilities to be considered by Board members that affect the company as a whole, such as budgets, compensation of officials, company-wide accounting and legal services, and employee insurance and benefit plans. Blair also contends that some financial matters cannot be segregated, so that Board members will be required to work together on matters that affect broadcast and nonbroadcast activities alike. For example, the subsidiary that is now the licensee of station WSCV(TV) borrowed $18 million from a bank to acquire the station. Blair, as parent, guaranteed the loan and agreed to terms that prohibit its shareholder equity from falling below $100 million and that preclude Blair from merging with another company or selling certain assets. Thus, Blair believes that actions taken in the nonbroadcast area could substantially affect broadcast operations. In Blair's view, Macfadden is "proposing a degree of involvement in broadcast financial affairs that is obviously incompatible with the notion that [Macfadden] is exercising no control or influence." Unlike *Warner Amex*, which involved two members of a large Board, the proposed Blair Board will have only three members. Blair therefore believes that it would be even more difficult in this case than in *Warner Amex* "for the Commission to ascertain whether the promise not to participate is being adhered to, and by extension impossible to enforce the terms of the promise." 75 F.C.C.2d at 936. In these circumstances, Blair concludes that there is no basis for finding that Mr. Carey and Macfadden are insulated.

16. That brings us to Blair's third challenge to Macfadden's proposal. It alleges that the departures from the procedures set out in the *Policy Statement* are not warranted on the facts of this case. Macfadden states that the *Policy Statement* does not explicitly cover its case because Blair is not principally engaged in FCC-licensed businesses. Blair counters that few communications companies are engaged exclusively in broadcasting, and most are diversified companies engaging in many activities not subject to

our jurisdiction. Blair characterizes the *Policy Statement* as a comprehensive document, and concludes that the absence of different procedures for companies with substantial nonbroadcast activities, given our knowledge of our licensees, clearly indicates our intention to apply the same standards. Blair concludes that the procedures adopted there should be applied in full in this case.

17. *Macfadden's Response.* With respect to maintaining the *status quo*, Macfadden does not contest the fact that its proposal departs from the procedures discussed in the *Policy Statement*, with regard to its plans to remove the existing Blair Board, to reconstitute a new, three-person Board that includes Macfadden principals, to take control of the company's nonlicensed businesses and to sell some of them promptly. Macfadden believes there is good reason for that departure. It states that the broadcast operations are financially viable and are not subsidized by other, nonregulated Blair businesses. Macfadden suggests that the absence of any discussion in the *Policy Statement* is not, as contended by Blair, an indication that the Commission sought to apply its tender offer procedures inflexibly to companies that are not primarily engaged in Commission-regulated activities. According to Macfadden, the lack of discussion was more likely based on "a desire to have a concrete case before it as a vehicle for the development and articulation of policy in this area." This view is consistent, in its opinion, with our statement that "the adoption of this *Policy Statement* . . . is not intended to foreclose the Commission, in a particular proceeding, from adopting a different approach if warranted in specific circumstances." *Policy Statement*, 59 R.R.2d at 1584.

18. In the absence of subsidies to broadcast operations from other parts of the company, Macfadden finds no objective or support in Title III of the Act for denying a successful tender offeror immediate access to nonlicensed activities. It further believes that there are sound public interest grounds for doing so. It notes court decisions for the proposition that our public interest determinations should try to accomodate other federal policies, and to minimize any conflicts, citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985), and *LaRose v. FCC*, 494 F.2d 1145, 1146 n. 2 (D.C. Cir. 1974). These concepts, Macfadden observes, were expressly recognized by the Commission in the *Policy Statement*, 59 R.R.2d at 1540, and in *One Two Corporation*, 58 R.R.2d at 1531–32. Macfadden continues:

> The stakes in the resolution of this issue are rather greater than those described by Blair. [Footnote omitted.] They are not merely that the shareholders will have the right to exercise their rights more promptly. To reject immediate access to nonbroadcast properties is to reduce the incidence of unsolicited offers, particularly those which depend significantly . . . upon borrowed funds. This surely diminishes shareholder rights and shareholder value, and, to that extent, the flow of capital into companies with FCC-licensed facilities. More important in the broad aspect, however, is the maintenance of pressure to perform which the possibility of a successful hostile tender brings to bear upon incumbent management.

This position, Macfadden states, is also consistent with policies underlying the Hart-Scott-Rodino Act, 15 U.S.C. § 18a (West Supp. 1985), as was recognized by the Commission in *L. P. Media, Inc.*, 58 R.R.2d at 1531.

19. Macfadden acknowledges that the Commission has not specifically addressed the question of segregating broadcast from nonbroadcast assets in the context of a transfer of control under section 310(d) of the Act, but it cites several of our cases for the proposition that the Commission in other contexts is assertedly not willing to make nonregulated businesses a hostage to those parts of corporate activities we do regulate.[7] Macfadden states that these cases "evidence both the broad latitude the Communications Act affords and the Commission's predilection to avoid unnecessary interference with legitimate, good faith transactions for the sake of form." Further, spinning off nonregulated businesses is, in Macfadden's view, consistent with the rules and policies of the Interstate Commerce Commission in analogous situations, citing *Water Transport Association v. ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). Macfadden characterizes that court case as recognizing that a refusal to permit the use of a voting trust as a temporary device would disrupt larger acquisitions involving unregulated assets and perhaps foreclose the transaction completely, citing 715 F.2d at 594. Blair concludes from the above that there "is no reason in principle to deny access to nonjurisdictional assets. The problems which the Commission will encounter are practical, not legal."

20. With regard to Macfadden's right to sell any acquired stock "at any time," Macfadden notes that the Commission approved a trust agreement with identical language in *L. P. Media, Inc.* It

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[7] These cases include: *Baker Protective Services, Inc.*, 97 F.C.C. 2d 570 (Rev. Bd. 1984), *aff'd* 59 R.R.2d 1141 (1986); *ISA Communications Services, Inc.*, 90 F.C.C.2d 938 (1982); *Xerox-MCI*, 90 F.C.C.2d 547 (1982); *Arthur J. Lipper*, 85 F.C.C.2d 1023 (1981); *CNA Financial Corporation*, 58 F.C.C.2d 607 (1976); and *Sho-N-Tel, Inc.*, 35 F.C.C.2d 330 (1972).

contends that nothing in the *Policy Statement* requires modification of that provision. As to Blair's allegation that this ability to sell "opens the way" to manipulation of stock prices, Macfadden states that any such manipulation falls squarely under the jurisdiction of the SEC and violates criminal laws. There is no need, Macfadden states, for the Commission to involve its processes based on the unlikely assumption that the parties will violate criminal laws. Macfadden does not deny that Mr. Carey's law firm has represented two of Macfadden's foreign investors, or a foreign company that sold Blair stock to Macfadden. But it does deny that the law firm's actions disqualify Mr. Carey under the *Policy Statement*. amd it finds Blair's contentions on this point opaque. Macfadden alleges in this regard that the facts presented do not present any incentive for Mr. Carey to act improperly.

21. Macfadden believes the requirement that Board members Callahan and Boylan not interfere with the trustee's conduct of broadcast operations is simply one aspect of the principle that Directors generally should not participate in corporate affairs in which they have a conflicting interest. Corporate Boards typically function through committees, Macfadden advises, and specific tasks are assigned to them, as will be the case if its tender offer is successful under its proposed plan. There is no legal infirmity to this plan because, Macfadden states, Delaware law, under which Macfadden is organized, permits a Board to designate committees of one or more, in order "to exercise all powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation affixed to all papers which may require it . . . ." Del. Cod Ann. Title 8, § 141(c) (1985).

22. Macfadden states that Blair's reliance on the Commission's decision in *Warner Ames*, 75 F.C.C.2d 393 (1979), is not justified. First, it contends, *Warner Amex* did not involve substantial offsetting public policy considerations, such as found in the laws pertaining to the governing of corporations that the Commission sought to accomodate in the *Policy Statement*. In fact, *Warner Amex* involved the cross-ownership rules, which Macfadden states are designed to foster diversity within the communications industry, an important policy not implicated in Macfadden's proposal. Second, *Warner Amex* involved a request for a permanent waiver, not a limited waiver pending long-form review. Based on its assessment of the issues raised by Blair as to Macfadden's qualifications upon long-form review, that will be a relatively

short period.[8] Third, Macfadden describes *Warner Amex* as involving two Directors proposing to recuse themselves when dealing with ten cable television systems owned by the company, but who would participate fully with respect to the remaining 100 systems. The division of authority in Macfadden's proposal, we are told, broadcast versus nonbroadcast, is much more clearcut than was the case in *Warner Amex*.

23. Macfadden recognizes the possibility that there could be violations of the terms of the trust agreement as to insulation between the Macfadden principals and the trustee. Macfadden observes, however, that such reliance on the good faith of the parties involved exists in other aspects of Commission regulation and indeed in many other areas, such as tax law. It was for that reason, Macfadden states, that it sought out Mr. Carey, "whose reputation for integrity was established during twenty-two very visible years in high elective office." Macfadden concludes that there is nothing in Blair's pleading to challenge that integrity.

24. Blair's corporate structure does not require a different conclusion, Macfadden asserts. First, it is the responsibility of Mr. Carey to segregate functions. Second, Macfadden states that Blair has identified very few individuals or positions that share functions in the broadcast and nonbroadcast areas. Third, it acknowledges that there are certain functions that must be considered by the Board from time to time, such as budgets, executive compensation, and other "overhead" activities. Macfadden does not consider these duties to present insurmountable barriers. Many of them depend on the duration of the trusteeship, which in turn depends on the time it takes to conclude our long-form review. Macfadden is confident that only a short time will be required. In any event, Macfadden sees little need to consider such subjects in the short time frame it contemplates. Even if those subjects should need to be considered, Macfadden avers, the trustee and the other Directors would be bound under the trust agreement to maintain the *status quo*. Macfadden also responds to the alleged difficulties in segregating blair's capital structure into broadcast and nonbroadcast segments, and the alleged effect that brings about as to insulation of those two activities. It states that the Commission is well aware of means of avoiding the commingling of capital structures, citing a Commission rule and several cases dealing with the segregation

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[8] As noted below in paragraph 39, we generally take no position as to Macfadden's qualifications at this time, leaving that for consideration in connection with the long-term applications.

of the capital structures of several common carriers and their subsidiaries.[9] In fact, Macfadden takes the position that its plan to sell Advo will diminish the need for commingling, because it will stop the "syphoning of funds from broadcast stations to keep other vastly troubled businesses afloat."

25. *Discussion.* This is the third case since April of 1985 in which we are asked in the context of a hostile tender offer to approve under the statute a two-step, trustee procedure to permit the acquisition of control of a corporation holding Commission broadcast licenses. As noted above, the other two cases are *L. P. Media, Inc.* and *One Two Corporation.* In part because of those cases, we also sought comments and later adopted the *Policy Statement*, which includes a full analysis of tender offers as related to the requirements of the Act. In considering the case now before us, therefore, we have the benefit of the experience and analysis provided by those rulings. We shall rely heavily on those decisions here and, for that reason, a very brief summary of the approach we have adopted and the underlying rationale for it will be helpful.

26. We have set four broad goals for our treatment of all cases dealing with hostile tender offers: (1) to carry out our statutory mandate fully; (2) to use neutral procedures, favoring neither incumbents nor challengers; (3) to act expeditiously, because dealy often favors one party in the contest for control; and (4) to accommodate to the fullest extent possible state and other federal laws and policies concerning the governing of corporations. *See, Policy Statement*, 59 R.R.2d at 1539–40. We seek to accommodate other federal policies in making our own public interest determinations because "[t]he Commission has a duty to implement the Communications Act, but also must do so in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights." *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985). *See also LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). Other relevant federal policies as to the governing of corporations may be foundin the Williams Act[10] and in the Hart-Scott-Rodino Antitrust Improvements Act.[11] These laws generally seek to protect shareholders and to provide for prompt action on the part of

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[9] *See, e.g.*, 47 C.F.R. § 64.702(d)(4); *American Information Technologies, Inc.*, 58 R.R.2d 471 (1985); *AT&T*, 91 F.C.C.2d 578 (1982); and *AT&T Co.*, 90 F.C.C.2d 404 (1982).

[10] 15 U.S.C. §§ 78m(d)–(e) and 78n(d)–(f).

[11] 15 U.S.C. §§ 8, 12, 15b–h, 16, 18, 26, 66, 1311–1314.

governmental reviewing bodies. They also serve to encourage informed choices by shareholders and to provide opportunities for them to benefit from competitive bidding for the stock of the company. Moreover, an efficient mechanism for permitting hostile tender offers is beneficial "because they serve a useful purpose in providing a check on entrenched but inefficient management." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). *See generally, Policy Statement*, 59 R.R.2d at 1554–57; *L. P. Media, Inc.*, 102 F.C.C.2d at 1282–84. Other agencies have adopted similar trust mechanisms under provisions similar to Section 310(d) of the Act. *See Policy Statement*, 59 R.R.2d at 1553–54; *Water Transport Association v. ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The two-step, trustee procedure is in fact an expedited process and, we believe, is neutral as between the contestants. Whether it carries out our statutory mandate fully in the circumstances of this case is the subject of the pleadings, and it is to that question that we now turn.

27. One of the novel aspects of this case is that Macfadden plans to take control of the corporation as soon as possible, assuming that its tender offer is successful, with regard to the Blair businesses not within our jurisidiction. To accomplish this, Macfadden proposes to reconstitute the Blair Board with members solely of its own choosing and to sell certain nonregulated assets promptly, and very probably before any decision on Macfadden's qualifications to hold Commission licenses. All of these proposed actions depart from the proposals we approved in *L. P. Media, Inc.* and in *One Two Corporation.* The essential difference between this case and those two earlier decisions, in Macfadden's view, is the fact that Blair is not primarily engaged in Commission-licensed activities.

28. The *Policy Statement* was intended as a general guideline. We recognized there that specific cases might require a degree of flexibility. It was for that reason that we concluded the *Policy Statement* with the observation that our action was intended to provide a general "framework for the regulatory treatment of tender offers," but that its adoption was "not intended to foreclose the Commission, in a particular proceeding, from adopting a different approach if warranted in specific circumstances." 59 R.R.2d at 1584.

29. We think Macfadden goes too far, however, in requiring the immediate election of a completely new Board. Clearly, a trustee could elect a minority of the Directors of the target company, if the tender offer is successful. We further provided the trustee

with sufficient powers to carry out his functions. *See generally, Policy Statement*, 59 R.R.2d at 1581–83. Specifically, "we believe that the trustee should be able to replace officers, directors or employees who have either resigned or whose actions are inconsistent with the trustee's obligations." *Id.* at 1583. Further, "the trustee must act in a manner which facilitates the underlying long-from transaction." *Id.* Similarly, the trustee can replace those who might seek to waste corporate assets, hinder the continuity of broadcast operations, or generally act to diminish the value of the broadcast properties as a transferable asset, in the event the long-form application is approved. *Id.* Accordingly, if existing officers, directors or employees seek to thwart the trustee's obligations, which might include those who oppose the sale of nonbroadcast assets, the trustee is permitted to replace them with persons who do not create such an obstacle. Such persons are required under the *Policy Statement* to have no familial or business relationships with the offeror. Macfadden's proposal to replace the entire Board from the outset, without consideration of the member's reaction to the Macfadden proposals, goes considerably beyond the limits set out in the *Policy Statement*. We conclude that the public interest is better served by following the guidelines in the *Policy Statement* than by making the substantial changes proposed by Macfadden.

30. We discuss next the insulation between the trustee and the offeror. Blair challenges first the right Macfadden has retained under the trust agreement to sell any acquired Blair stock "at any time."[12] As noted by Blair, we did state in the *Policy Statement* that "we shall not permit the offeror to exercise any control of the tendered stock nor . . . to influence . . . the actions of the independent trustee." 59 R.R.2d at 1563. Macfadden, on the other had, is correct in noting that we have already approved an identical right of sale in the trust agreement that was part of the applications in *L. P. Media, Inc.* We do not believe the matter requires extended discussion. Our decision in *L. P. Media, Inc.* was followed by the *Policy Statement*, and the latter decision provides guidance here. The goal of insulation is better served by requiring the beneficiary to share the decision to sell the acquired stock with the trustee, as we required in *Attribution*, 97 F.C.C.2d at 1024. Of course, questions as to whom the assets should be sold and the terms of sale would remain within the sole discretion of the trustee. The latter will, of course, be guided in that decision

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[12] Of course, any sale of a controlling interest would be subject to our prior review.

by his general fiduciary obligations. Accordingly, we would require a modification of the trust agreeement so that a sale of any acquired shares must be based on a shared decision of Macfadden and the trustee.[13] We do not believe that such a change imposes major difficulties on Macfadden, as it requires only minor modification of the trust agreement. This change should also allay Blair's concerns as to potential for stock manipulation, although we agree with Macfadden that SEC regulations and criminal laws are a more likely deterrent to possible illegal manipulation. The other provisions in the trust agreement permitting the sale of the stock after an adverse or conditioned grant (see paragraph 13, above) are permissible and need not be changed.

31. The trustee's law firm, as Blair notes, has represented two corporations that will invest in Macfadden debentures, and has also represented a related company that sold a substantial block of Blair stock to Macfadden just prior to the announcement of the tender offer. We are not persuaded that these circumstances and events raise a realistic concern that Macfadden will be able to control or influence the operation of the Blair stations while under the management of the trustee. Blair has not alleged that the trustee himself represented these clients. In fact, Blair itself submitted a copy of a deposition of the trustee, under oath, dated April 25, 1986. The trustee stated there, on pages 52–56, that: his law firm has 525 members; he was aware that his firm represented the corporations referred to by Blair; he was not previously aware of their connection to Macfadden as investors; and he does not represent those clients personally and has no knowledge of their affairs or the nature of the legal work done for those clients. Moreover, the debentures present a nonattributable, passive interest that represent less than eight percent of capital to be raised by Macfadden. The law firm's client lost its voting interest when it sold its Blair stock to Macfadden, and the firm does not represent Macfadden. The trustee himself stated in his comments that he will not represent investors in Macfadden during his tenure as trustee, and that he will not participate in

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[13] Although not raised by Blair, we would similarly require other minor changes in the trust agreement to make it consistent with our previous rulings. Paragraph 5(g) of the trust agreement would need to be changed in make clear that the trustee may only communicate *to* the offeror, in writing, on the management and operation of the licensed facilities. Further, we would require clarification of the precise meaning of trust paragraph 6(b) before permitting it to stand. Finally, paragraph 10(h) should be revised to conform with paragraph 22(5) of *L. P. Media, Inc.*, 102 F.C.C.2d at 1288–89.

any deliberations at the law firm as to the representation of such investors. To allay any concerns in this area, a grant of an STA would be subject to a condition to assure that Commission requirements are met. *See RKO General, Inc.*, 59 F.C.C. 2d 641 (1976).

32. We have also reviewed Blair's arguments as to the difficulties in segregating nonbroadcast from broadcast activities, and its conclusion that the facts alleged are inconsistent with the concept of insulation. The problems noted, however, are practical, not lega. It would be, under Macfadden's proposal, the obligation of the trustee and of Macfadden to segregate the activities. Blair, as noted by Macfadden, has pointed to very few positions in the company that share broadcast and nonbroadcast functions, which lessens any concerns on this score. Further, there are means by which commingling can be avoided at the Board level. See the cases cited above in footnote seven. There are some matters that might exacerbate insulation problems, if final consideration of the long-form application takes an inordinately long time. We are reluctant, however, to permit a licensee to bar a transaction such as is now before us, based on its own actions in setting up its internal organization. This, again, would place in the hands of the target company the means to thwart the congressional policies we seek to accommodate in our procedures for handling tender offers. We believe on balance that any potential risks from delay are outweighed by the benefits that flow from permitting tender offers to go forward, and that we can rely on the trustee and Macfaden to keep broadcast and nonbroadcast activities segregated. To help prevent any problem caused by delay, we hereby instruct the staff to process the long-form applications and any pleadings that might be filed against them on an expedited basis.

33. That brings us to the last question as to insulation—the composition of Macfadden's Board to include Messrs. Callahan and Boylan on the Board, along with the assertedly independent trustee. We realize that our discussion in paragraph 29 eliminates the specific problem presented. Hoewever, to avoid any future question on this point, we believe a brief disucssion is appropriate. It appears that this form of organization was based on a desire by Macfadden to minimize the possibility that its actions might trigger certain default provisions in debt instruments already issued by Blair. That is, of course, a perfectly valid business consideration. We also recognize that businesses often conduct their affairs by delegating certain functions to committees, and that Directors may not participate in some cases in

certain Board actions because of conflicts of interest. The reason for insisting on insulation bewtween the trustee and the offeror, however, is to assure that the offeror does not control or influence the operations of the licensed facilities prior to the completion of our long-form review of its qualifications. This, we believe, is essential to carrying out the purposes of section 309 of the Act. "The best method of safeguarding the independence of the trustee is to require strict separation between the trustee and the offeror." *Policy Statement*, 59 R.R.2d at 1579. As noted earlier, one of our goals is to accommodate to the maximum extent possible other laws dealing with the governing of corporations. Our primary responsibility, however, is to carry out our statutory mandate fully. We believe that Macfadden's proposal leans too far in the direction of its private interests, and not toward the policies expressed in the Act, as interpreted in the *Policy Statement*. We find that the ongoing working relationship, such as is proposed by Macfadden in its three-person Board, is simply inconsistent with the concept of insulation.

34. In so concluding, we do not question the integrity of the individuals involved. It is the composition of the Board (Macfadden principals plus the trustee) that creates the problem. In the expedited processes used in considering tender offers, we must rely heavily on the structure of the relationship to assure appropriate insulation. We have recognized similar concerns in connection with the administration of our rules concerning the ownership of media. *See Warner Amex*, 75 F.C.c2d 393 (1979); *New International, PLC*, 97 F.C.C.2d 349, 370 (1984). We find Macfadden's efforts to distinguish *Warner Amex* unpersuasive, and agree with the conclusions in that case that compartmentalization of decisionmaking processes of a Board is very difficult, as a practical matter, and beyond enforcement. *See Warner Amex*, 75 F.C.C.2d at 396.

35. We recognize that Macfadden was working in an area where it perceived a reason for departing from the *Policy Statement*, and we do not fault Macfadden for its effort. Although several future courses might be available, the one Macfadden chooses to follow depends on its assessment of the facts, its own corporate charter, and the advantages and disadvantages of other alternatives. Now, however, we must still consider the remainder of the matters raised by Blair.

General Compliance of the Proposal with Section 309 of the Act

36. In addition to its challenge under the *Policy Statement* to the procedures proposed by Macfadden, Blair also alleges that the proposal is inconsistent with section 309 of the Act. Blair first contends that the grant of the STA cannot be viewed independently of Macfadden's qualifications to hold the licenses involved, and that there are serious questions in that regard that cannot be resolved without a hearing. Secondly, Blair contends that, on the facts presented, the required showing has not been made to support the grant of an STA under section 309(f).

37. Blair alleges that Mr. Callahan has not been candid about his broadcast record at Bartell Media Corporation, which reflects adversely on the reliability of Macfadden as a prospective licensee. Blair further states that Macfadden has not been candid with regard to the role of alien entities in its corporate structure. The resolution of these questions in a hearing would take a long time, and the grant of an STA for such an extended period is a factor Blair believes is essential in determining whether a temporary authorization should be issued.

38. In the past, we have deferred consideration of the offeror's qualifications until the long-form applications are reached for processing. *See, e.g., L. P. Media, Inc.*, 102 F.C.C.2d at 1286. We shall follow that course here and, for that reason, have not elaborated Blair's allegations on these points.[14] If we examined the offeror's qualifications at this time, there would be a risk that the STA could be for a long period of time. The procedures set out in the *Policy Statement*, however, are designed to promote expeditious consideration of STA requests filed as a part of a tender offer. As noted previously, the need for expedition was based on other federal policies that encourage prompt government action in the area of tender offers. *See Policy Statement*, 59 R.R.2d at 1554–57. Those policies would be thwarted to the extent that time is needed to conduct, in essence, a long-form review of the offeror prior to the grant of an STA. We believe on balance that our focus at this point should be generally on the procedures proposed and on the qualifications of the trustee.

39. We reach that conclusion as a general matter, but now must consider the exception. Macfadden will provide the funds for the purchase of shares to enable the trustee to acquire control of

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[14] Macfadden denies that Blair's allegations raise substantial and material questions of fact. We make no determination here on the merits of the contentions.

Blair. The trustee and Macfadden therefore stand or fall together as to financial qualifications. We have not abolished the obligation of applicants to establish that they are financially qualified, although the showing submitted in applications has been reduced to a certification. In cases such as the one before us, however, applications incorporate extensive financial information as a part of the submissions to the SEC. Blair contends that this material shows that Macfadden is not financially qualified. As noted above in footnote five, Macfadden relies on several sources of capital to buy Blair's stock, including a bank loan of $120 million and debentures in the amount of $145 million. Blair alleges that the loan agreement specifies a commitment of only $30 million, plus a promise to use its "best efforts" to secure other banks for the remaining amount. Moreover, the loan is limited to $75 million, unless all of the $145 million in debentures is subscribed. In Blair's view, Macfadden has established commitments to buy only $60 million of the debentures (a subsequent amendment increases that figure to $73 million), although the underwriter states that it is "confident" that the remainder will be sold. Blair believes that "best efforts" and "confidence" do not provide a "present firm intention" on the part of lenders or underwriters to supply needed funds, as called for by the certification in Form 315. Thus, Blair believes that Macfadden has established only $90 million ($103 million in light of the amendment) from the loan and debentures, instead of the claimed $265 million.

40. Blair also alleges that it is not sufficient to take the position that if the funds are not available, the offer will fail. In this regard, Blair contends that under the terms of the tender offer, Macfadden can accept the stock but defer payment for a considerable period of time, during which it could allegedly take control of the company. Blair also states that a high debt-to-equity ratio is not necessarily consistent with the public interest, citing *ABC-ITT Merger*, 9 F.C.C2d 546, 572–73. Although it notes our more recent reluctance to make such business judgments, Blair suggests that "in a case in which an applicant proposes to take extreme and plainly irresponsible risks with the financial stability of a broadcast licensee, the Communications Act does not permit the Commission to ignore the attendant danger to the public interest in broadcast service."

41. Macfadden asserts that it is financially qualified under Commission standards, and we agree. Our financial standard is not one that requires firm commitments. Instead, we require that an applicant demonstrate that it has a "resonable assurance" that

the necessary funds will be available. *See Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1119 (D.C. Cir. 1978). Indeed, if specifically committed funds were required in large transactions such as Macfadden's, the advance commitment fees themselves would probably present a very high and unnecessary hurdle to applicants. Blair, in support of its position, has submitted a letter dated May 5, 1986, from a financial expert, commenting on the capitalization of Macfadden's proposal. Macfadden responds by noting that the May 5 letter does not conclude that Macfadden's plan is not viable. Macfadden also notes that the May 5 letter is based on the erroneous assumption that Macfadden will not divest certain Blair assets if its tender offer is successful. Thus, we give no credence to the May 5 letter, which fails to raise a substantial and material question of fact. With regard to Blair's concerns as the extent of Macfadden's proposed capitalization, we have declined to become involved in making determinations as to the appropriate level of corporate indebtedness. *Polciy Statement*, 59 R.R.2d at 1566 n. 139.[15] The May 5 letter provides no basis for changing that policy in this case.[16] In addition, Blair has not challenged Macfadden's position that broadcast operations are economically viable and that the sale of nonbroadcast assets will add to the financial stability of the reconstituted company.

42. In further support of its position, Macfadden has submitted a letter dated May 8, 1986, from its investment advisor, a large and well-known investment company. That letter indicates the advisor's familiarity with Macfadden and its financial plan, the materials on file with the SEC, and publicly available information as to Blair. The advisor states that it is "highly confident" as to the success of both the sale of the debentures and the availability of the bank loan on the basis of its "experience and financial reputation in the financial markets." We have previously found that such expert letters can be used to establish that an applicant's "proposed public offering is a valid method of demonstrating its financial qualifications." *Advanced Mobile Phone Service, Inc.*, 91 F.C.C.2d 512, 517 (1982). Moreover, we have reviewed the bank letter dated April 8, 1986, submitted to the SEC. Unlike the case confronting the Review Board in

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[15] To the extent that this general statement conflicts with our earlier statement in *ABC-ITT Merger*, 9 F.C.C.2d 546, 572–73 (1967), it is the most recent decision that must prevail.

[16] Blair suggests, based on language that is apparently standard in the financial community, that Macfadden may accept the shares but not pay for them for a long period. We think that Macfadden's representation that it has no such plan to defer payment disposes of Blair's concerns.

Dutchess Communications Corp, 101 F.C.C.2d 243 (Rev. Bd. 1985), the bank letter relied upon by Macfadden shows the bank's familiarity with Macfadden and its financial plans and its planned acquisition of Blair. The bank has offered a commitment for its 25 percent portion of the loan and its "best efforts" to obtain funds from the other participating banks. The advisor's and the bank's letters provide, in our judgment, a reasonable assurance that the necessary funds will be available. *See Multi-State Communications, Inc. v. FCC*, 590 F.2d at 1119–20.[17] Accordingly, based on the information before us in the pleadings and applications, we conclude that Mcfadden is financially qualified.

43. Blair's second challenge, as noted, goes to the propriety of issuing an STA under section 309(f) of the Act in this case.[18] It is Blair's position that the *Policy Statement* does not imply, and the statute does not permit, the issuance of an STA in every case. Instead, we are told, the statute requires the finding of a compelling need and of "serious prejudice" to the public interest that would result from delay. To that end, Blair suggests a balance of several factors to be considered in each case involving tender offers: (1) the degree to which the proposal is inconsistent with the policies embodied in section 309; (2) the undesirable features of the control structure we are asked to authorized; (3) the length of time the STA is likely to last; and (4) the likelihood of prejudice to the decision on the long-form application, and the interplay between this factor and the duration of the trusteeship.

44. As to the first factor, Blair refers to its showing, summarized above, as to the asserted lack of insulation and the changes in the *status quo* that will result from Macfadden's proposal. This would place Macfadden in effective control of the company prior to Commission consideration of its qualifications, according to Blair. Further, consideration of Macfadden's financial qualifications cannot be deferred until the long-form is considered, because, Blair states, "of the harm that the proposed restructur-

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[17] Macfadden's financial advisor also addresses the possibility that a loan to a Blair subsidiary, guaranteed by its parent, might be in default if Macfadden's tender offer is successful. In the event that the lender should elect to call in the loan, the advisor states that there is a reasonable expectation that the loan can be refinanced. We believe that this statement provides the needed "reasonable assurance" so that this possibility does not affect Macfadden's financial qualifications.

[18] Blair also questions our authority to authorize the transfer of control to the trustee under section 309(c)(2)(B) of the Act. *See One Two Corporation*, 58 R.R.2d at 930–31. Because we have elected to proceed under section 309(f), we need not summarize or address these contentions.

ing would wreak on the Company as a whole and necessarily on its broadcasting stations." As to the nature of the control structure, Blair quotes from prior Commission rulings as to the general undesirability of temporary control "because of the natural reluctance of the licensee to make major investments in the improvement of service or facilities and the effect of short-term ownership on incentives for maximum performance of employees."[19] Blair also contends that the grant of the STA in this case is prejudicial in that the "inherently unappetizing alternative" of adding to the life of an undesirable control structure will affect our fair consideration of the long-form application. Blair does not find public interest factors sufficient to overcome these perceived problems, and concludes that the grant of an STA in this case would be an abdication of responsibility.

45. We agree that the issuance of an STA is not automatic and may involve our balancing of several factors, as this decision demonstrates. The balance for the most of the factors has already been made in the *Policy Statement*, including the possibility of delay and the nature of the interim control structure. The concerns Blair expresses as to possible prejudice to the outcome of the long-form proceeding were carefully considered. *See* 59 R.R.2d at 1566-67. We find that Macfadden's applications are "otherwise authorized by law" within the meaning of section 309(f) of the Act. Further, it is the nature of the tender offer itself that make the situation "extraordinary," within the meaning of that section. *Id.* at 1570 n. 150. We conclude, therefore, that the issuance of an STA in this case would be consistent with section 309(f), except for the matters previously noted.

Other Matters

46. Blair makes two final challenges, both going to the trustee's qualifications to receive an STA. Blair alleges that "there is no evidence of record that the proposed trustee ... has any broadcast or other relevant business experience." We note first that the trustee has certified that he is a United States citizen, that he has no media interests that conflict with our rules, and that he has violated no laws about which we are concerned. Blair has not challenged those certifications. Although we have never specified business or broadcast experience as a prerequisite to being a trustee, Macfadden points to Mr. Carey's long history in

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[19] Blair cites in this regard: *Grayson Enterprises, Inc.*, 79 F.C.C.2d 936, 939 (1980); and *RKO General, Inc.*, 89 F.C.C.2d 297, 323 n. 106 (1982).

business and his experience as Governor of New York. We find that he is qualified. Last, Blair again refers to Mr. Carey's law firm's representation of a foreign corporation. That connection, in Blair's opinion, makes Mr. Carey a representative of that corporation, in contravention of section 310 of the act. Again, we note that Blair has not alleged that Mr. Carey himself represents this client. We find no factual support for the allegation that he is a representative of that corporation, and reject the contention.

47. We have given the applications and the pleadings careful consideration. For the most part, we believe that Blair's Motion to Dismiss or Deny must be granted. For the reasons stated, we cannot conclude that the public interest would be served by a grant of an STA to the trustee. Blair's contingent motion for staty is, therefore, moot, and will be dismissed.

48. Accordingly, IT IS ORDERED, That the request of Macfadden Acquisition Corp. for the issuance of a special temporary authority to a trustee IS DENIED.

49. IT IS FURTHER ORDERED, That the Motion to Dismiss or Deny filed by John Blair & Company IS GRANTED to the extent indicated above and IS DENIED in all other respects.

50. IT IS FURTHER ORDERED, That the contingent motion for stay filed by John Blair & Company IS DISMISSED as moot.

51. IT IS FURTHER ORDERED, That the Chief of the Mass Media Bureau shall send copies of this Memorandum Opinion and Order, Certified Mail, Return Receipt Requested, to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, Secretary

Statement of FCC Commissioner James H. Quello Dissenting-in-Part

In re: Application of Macfadden Acquisition Corporation for Commission Consent to a Transfer of Control of John Blair & Company.

I agree with my colleagues that the request made by Macfadden Acquisition Corp. for the issuance of a special temporary authority to a trustee should be denied. Clearly, Macfadden's proposal to elect a completely new board consisting of Macfadden's principals, Mr. Callahan and Mr. Boylan, and Macfadden's designated trustee is inconsistent with our *Policy*

Statement addressing tender offers. *See, Tender Offers and Proxy Contests*, 59 R.R. 2d 1536, 1581-83 (1986). Furthermore, the *Policy Statement* addresses the issue of insulation between the trustee and the offeror. *See, "Policy Statement*," 59 R.R. 2d at 1579. The reason for this insulation is to assure that the offeror does not control or direct the operation of the targeted company prior to the review of the long-form application. Macfadden's failure to insulate sufficiently the offeror from the trustee would be inconsistent with the public interest.

I dissent to the extent the Order reaffirms what I consider to be the Commission's prior error in establishing a "trustee" concept pertaining to tender offers and proxy contests. As I have indicated in my prior dissents on this topic, the use of a trustee does not comport with the express requirement of Section 309 of the Communications Act. 47 U.S.C. Section 309. Specifically, Section 309 requires that any application for the transfer of rights under a station license involving a "substantial change in ownership or control" must be preceded by a 30-day holding period and by an opportunity for the filing of petitions to deny. *See*, 47 US.C. Sections 309(b), 309(c)(2)(B), and 309(d)(1). Macfadden is proposing a substantial change in ownership and control and therefore should be subject to Section 309 provisions. For further discussion of this matter, I refer the reader to my dissent in *One Two Corporation (McCarthy)*, and the *Policy Statement* on Tender Offers and Proxy Contests. *See, McCarthy*, 58 R.R. 2d 924, 937 (1985), and "*Policy Statement*," 59 R.R. 2d at 1584-86.

CONCURRING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In re: Application of Macfadden Acquisition Corp. for Commission Consent to a Transfer of Control of John Blair & Company

I agree with the conclusion reached in this item that the STA must be denied because of Macfadden's proposal to replace immediately the entire Board of Directors and, further, to let two principals of the offeror sit on the Board while the trust mechanism is in place. I do not find it necessary to determine at this juncture whether Macfadden's other proposals are consistent with the public intereest and the Communications Act. Because I do not reach a decision on these other issues, I concur.

Candor, Lack of
Circumstances, Change In, Substantial or Significant
Misrepresentation
Renewal of License, Denies

> **Review Board reverses I.D. and denies renewal application for Station WBBY(FM), 103.9 mHz, Westerville, Ohio. Applicant made willful, repeated, intentional misrepresentations, lacked candor, and seriously violated rule Sec. 1.65, during the comparative phase of the case, with regard to the changed employment circumstances of its 24% owner/proposed station manager. Separate statement suggests that Commission replace non-renewal and revocation remedies by compulsory divestiture.**
>
> —*Mid-Ohio Communications, Inc.*
> MM Docket No. 82-282

FCC 86R-41

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of MID-OHIO COMMUNICATIONS INC.	BC DOCKET NO. 82-282 File No. BRH-790601F6
For Renewal of License of Station WBBY(FM), Westerville, Ohio	

Appearances

Lee W. Shubert, Esq. and *Richard M. Riehl, Esq.* on behalf of Mid-Ohio Communications, Inc.; and *Larry A. Miller, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 25, 1986; Released: July 9, 1986.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), BLUMENTHAL, AND ESBENSEN, BOARD MEMBER BLUMENTHAL ISSUING SEPARATE STATEMENT, IN WHICH BOARD CHAIRMAN MARINO JOINS, IN PART.

BOARD MEMBER ESBENSEN:

1. This proceeding now involves only the application for renewal of license of WBBY(FM), 103.9 mHz, Westerville, Ohio, licensed to Mid-Ohio Communications, Inc. (MOC). By *Memorandum Opinion and Order*, 56 RR 2d 238 (Rev. Bd. 1984), the Review Board remanded the case for further hearing before Administrative Law Judge John H. Conlin (ALJ) on new issues[1], including the following with respect to the application of MOC:

> To determine whether Mid-Ohio Communications, Inc. [MOC] violated Section 1.65 of the Commission's Rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Ohio's basic or comparative qualifications.

2. Further hearings were held on July 23-26, 1985 on this new issue. In a *Supplemental Initial Decision* (FCC 85D-75) released December 23, 1985 (SID), the ALJ granted the application of MOC for renewal of license of WBBY(FM). Now, nearly seven years after MOC originally filed its renewal application, the proceeding is before us on Exceptions to the SID filed by the Commission's Mass Media Bureau, Contingent Limited Exceptions filed by MOC, and Reply pleadings filed by both parties. Oral argument was heard on April 11, 1986. We have reviewed the SID in light of all the foregoing and have conducted our own full *de novo* review of (1) the WBBY(FM) Commission files; (2) the transcript of the proceedings; and (3) the exhibits and

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[1] One other issue was simultaneously specified with respect to the then-competing applicant for the frequency, Metro Broadcasting, Inc. (Metro). As will be discussed herein *infra*, Metro dismissed its application prior to the subsequent hearing proceedings. The issue designated against Metro, perhaps hastening its exit from this proceeding, was as follows:

> To determine whether Metro Broadcasting, Inc., failed to submit complete and accurate information regardiung its corporate documents, stock ownership, and financial qualifications in violation of the Commission's filing, reporting and candor requirements, and the effect thereof on Metro's basic or comparative qualifications.

documents contained therein. However, before turning to our decision, we are compelled to set forth the history of WBBY(FM) and the related proceedings before the Commission over the past seven years.

3. *Background and History*: At the outset we specifically note that this extra-record recitation does not provide any bases for our decision herein. It may be construed that the facts set forth in this section of our decision could provide additional support for a finding that MOC had a *motive* to deceive the Commission; however, as will be discussed, *infra*, there is ample evidence in the record of the original proceeding and the remand hearing pertaining to MOC's motives and intentions. Nevertheless, since this proceeding has occupied some seven years of the Commission's time and resources, a review of the background and history of this beleaguered facility provides an interesting perspective. We have extensively reviewed the Commission's license and ownership report files of WBBY(FM), and officially notice the facts contained therein.

4. The original construction permit for this facility was granted to MOC on June 19, 1968. The current call letters were assigned October 31, 1968, and the initial license for the station was granted May 28, 1969. WBBY(FM) was apparently granted three regular renewals of its license up through and including the period ending in 1979. However, when MOC filed its application for regular renewal on June 1, 1979, Metro Broadcasting, Inc. (Metro) filed a competing application for the frequency. The initial principal of MOC was William R. Bates who owned in excess of 50% of the stock of MOC and who was its President and a Director.[2] Mr. Bates' son, Kenneth M. Bates, was elected an officer and director of MOC in 1968 and was active in the day-to-day operation of WBBY(FM). In 1972, Kenneth also acquired a 10.3% interest in MOC in consideration of his past services.[3] On December 8, 1977, Kenneth, as an officer and director of MOC (having failed on at least two occasions prior to this date to have his father committed to an institution) verified a complaint before the Court of Common Pleas of Delaware County,

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[2] The stock ownership of MOC now resides entirely with the Carl C. Nourse family. 24% is owned by Carl Nourse's son, Richard P. Nourse (the subject of the issue herein), and 76% by QNP Corporation, a company wholly-owned by Mr. and Mrs. Carl C. Nouse. The acquisition of the stock of MOC by the Nourse family is discussed herein, *infra*.

[3] The remaining stock, approximately 39%, was owned, at various times and in various percentages, by as many as nine other minority shareholders between 1968 and 1977.

Ohio, seeking to have his father enjoined from continued operation of, and association with, WBBY(FM). The Court granted the injunctive relief sought and filed a final Judgment Entry on February 7, 1978, permanently enjoining William R. Bates from activities associated with MOC.[4]

5. The Nourse family became visible, insofar as the records of the Commission are concerned, in September 1977—just several weeks before Kenneth Bates went to court to have his father restrained. Between September 12, 1977 and November 3, 1977, in what were apparently eight separate transactions, Carl C. Nourse, through his wholly-owned company BIC Agency, Inc., bought up 34.7% of MOC's outstanding common stock (including 34% of Kenneth Bates' stock) for a total consideration of $86,500 in cash and notes. In his *Initial Decision*, FCC 83D-53, released September 16, 1983 (I.D.), the ALJ noted that Nourse "shared" the "lack of confidence" in William R. Bates and encouraged the lawsuit resulting in Mr. Bates' formal removal from WBBY(FM). I.D., n.4. Thereafter, on September 18, 1978, Carl Nourse, through the same business entity, bought an additional 10 shares of MOC for $5,000 from Sam Bates (presumably, though not disclosed, a Bates family member or relative), increasing the Nourse holdings to 36.78%. Just 46 days later, on November 3, 1978, Nourse concluded acquisition of all remaining "minority shares" of MOC by purchasing the balance of the stock held by Kenneth Bates (33 shares) and all the stock held by the other member of the MOC Board of Directors (David C. Mylander) for a total consideration of $50,400 on "installment contracts". On November 9, 1978, QNP Corporation, also wholly-owned by the Nourse family, purchased the shares held by BIC Agency, Inc. Thus, within 14 months, Nourse-owned entities (1) acquired a 49.9% interest in MOC for $141,900 in cash and notes; (2) encouraged the lawsuit to have William R. Bates removed from WBBY(FM); and (3) purchased all the shares held by Mr. Bates' son and the other remaining director of MOC.

6. It is also notable that on September 25, 1978, MOC entered into an agreement with yet another Nourse family entity, Capital Car Rentals Company, Inc. (Capital Car), agreeing to issue 15 of the remaining 19 authorized but unissued shares of MOC to

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[4] The Court opined, *inter alia*, that the elder Mr. Bates had performed actions which demonstrated lack of business knowledge; allowed his (FCC operator's) license to lapse; performed his "unauthorized" "Wild Bill Routine" in public at remote broadcasts; and was suffering from a "medical condition" which impaired his ability to function on behalf of MOC.

Capital Car in exchange for a new transmitter for WBBY(FM). On the same date, Capital Car entered into an agreement to assign all these shares to Carl Nourse's BIC Agency, Inc. On December 18, 1978, in an attempt to gain control of MOC, an application for transfer of control was filed with the Commission (I.D., para. 3) based upon the issuance of these 15 shares, absent the signature of William R. Bates, the controlling shareholder. No action was taken on the application and, apparently as the result of informal contact with the Commission's staff, on February 23, 1979, the application for transfer of control was resubmitted with a letter from then-counsel to MOC claiming that Mr. Bates' signature was not necessary and that the consummation of the transaction to issue these 15 shares would result in a transfer of control. Again, no action was taken by the Commission.

7. In the meantime, William R. Bates' problems were exacerbated by the entry of a Decree of Divorce from his wife of 25 years, Anna, effective September 28, 1978. In this Decree, *inter alia*, the Court ordered Mr. Bates to sell his stock, real property, tower, and related assets in MOC, and divide the proceeds therefrom with his wife. Mr. Bates was unsuccessful in an appeal; thus, he entered into a listing agreement with a broadcast property broker, Chapman Company, Inc., of Atlanta, Georgia, whereby Chapman would conduct a sale of Mr. Bates' assets on a highest sealed-bid basis. The sale was advertised on August 12, 1979 and sealed bids were to be received just 24 days later. On September 7, 1979, the sealed bids were opened and the Nourse family, through QNP Corporation, was the highest bidder. The assets, which included the controlling interest in WBBY(FM), sold for $172,500, with 25% down and the balance due over three years. Thus, in September 1979, the scoreboard read as follows: The Bates family no longer had any ownership interest in WBBY(FM) and William R. Bates, the former president and majority shareholder, had realized $86,250; his wife, Anna, $91,250; and Kenneth, the son, $34,900. Conversely, the Nourse family had obtained 100% of MOC for $314,400, consisting of part cash and favorable terms on the balance.

8. The activities at WBBY(FM) attracted the attention of other media in the area. The record is replete with references to the "bad publicity" surrounding the activities at the station. Since most of these events occurred around the time the regular application for renewal of license of WBBY(FM) was to be filed, it is not surprising that a competing applicant, Metro, filed an

application for the WBBY(FM) facilities on September 4, 1979.[5]

9. Approximately three years later the Commission promulgated a *Memorandum Opinion and Order*, 90 FCC 2d 114 (1982), designating the applications of MOC and Metro for comparative hearing to determine the best-qualified applicant to operate WBBY(FM). In the same *Order*, the Commission also granted the pending transfer of control application to the Nourse's QNP Corporation noting that "at this point in time there is no one with an unencumbered legal right to vote [William R. Bates'] 50.1% stock interest" and that the grant would "best serve the public interest by ensuring continued operation of the station during the pendency of the hearing proceeding." 90 FCC 2d at 117-118.[6] The *Order* also specified the standard comparative issue, as well as a financial qualifications issue with respect to Metro.[7]

10. In granting Metro's application and denying MOC's application for renewal of license, the ALJ found that the Nourse-owned entity should not receive credit for the broadcast record of WBBY(FM), nor should it be tainted by any deficiencies attributable to its operation because for most of the license term in question "legal control of [MOC] was in limbo." I.D., Findings, para. 23. Nevertheless, the ALJ did conclude, based upon examination of the past-performance of WBBY(FM), that its past record warranted "neither a preference nor a demerit." I.D., conclusions, para. 17. The ALJ ultimately concluded that no preference had been found for diversification of media ownership interests, and that "Metro has been found superior in terms of integration of ownership with management."[8]

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[5] Mr. Bates also filed a competing application to get his station back but his application was dismissed for failure to prosecute some two years later (on December 3, 1981).

[6] It is interesting to note that in this *Order* the commission considered allegations made by Metro in a Petition to Deny concerning, *inter alia*, alleged misrepresentations of Carl C. Nourse. The Nourse family was apparently attempting to purchase AM station WRFD, Columbus-Worthington, Ohio. Metro alleged that Nourse represented to a principal of the licensee of WRFD that he (Nourse) exercised positive control over the licensee of WBBY(FM); Metro further alleged that Nourse's corporation, QNP, had prematurely assumed control of WRFD by having the licensee hire a general manager. The allegations were denied, and the Commission declined to add the requested issues. With the clarity of hindsight and our extensive review of the entire record herein, including the actions and activities of the nourses and the testimony of Carl C. Nourse, it may be that there was, after all, more fire than smoke in Metro's allegations.

[7] Metro satisfactorily resolved the financial issue in its favor on the first day of hearing.

[8] Interestingly enough, the ALJ also concluded that Richard Nourse's proposed

11. Shortly after release of the I.D. granting Metro's application, both parties filed Motions to Enlarge the issues and reopen the record. We added both requested issues. Metro, then facing a potentially disqualifying issue, elected to dismiss its application in return for the payment of $103,000 by MOC. *Memorandum Opinion and Order*, FCC 85M-2618, released June 26, 1985.[9] Thus, having eliminated the Bateses from ownership of WBBY(FM)[10] and the competing and prevailing applicant (Metro) from the scene, the Nourse family proceeded to the remand hearing with only one (albeit significant) issue remaining to be resolved. Again, we have not, relied upon the foregoing in reaching our decision herein; however, even if the perspective gained by a review of these facts is no more than of passing interest, it also reflects our concern with reviewing all information that may have, or had, a bearing on this proceeding.

12. *Discussion*: Pursuant to the remand issue, and the evidence adduced thereunder, our discussion herein will focus on the following pertinent considerations: (1) Did MOC violate Section 1.65 of the Commission's Rules by its alleged failure to report that Richard Nourse was, in fact, working in another capacity for another business entity (Pioneer Chevrolet) during the time he was purportedly working full-time for MOC and WBBY(FM)? (2) Did Richard Nourse, even though he was allegedly employed

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integration constituted impermissible upgrading because it related directly to the comparative issue and Richard became a stockholder more than a year after the cut-off date. I.D., Conclusions, paras. 14-15. Had MOC perspicaciously recognized this probable outcome, it would not find itself in its current predicament.

[9] The ALJ noted in this *Order* that a previous settlement agreement filed by the parties in December 1984 was contingent upon MOC favorably resolving the issue under review herein. MOC filed a Motion for Summary Decision which was denied by the ALJ in April 1985. The parties reformulated the terms of the settlement agreement to provide for payment by MOC to Metro regardless of the pending issue, and the settlement agreement was approved.

[10] Kenneth Bates "resigned" as General Manager in 1982. I.D., Findings, para. 18. More succinctly, the ALJ found (SID, para. 60) that "[w]hen the Commission granted the transfer of control of [MOC] to QNP, the Nourse family felt compelled to replace the then general manager, Ken Bates. Ken was the son of Bill Bates, from whom control of [MOC] had been wrested as the result of a legal battle between the elder Bates and QNP." It is noteworthy that Kenneth Bates joined with his father, William R. Bates, in executing an agreement on October 2, 1982 to assign the license of WBBY(FM) to a third-party assignee, Westerville Broadcasting Company, Inc., for a total consideration of $800,000.00. The application was filed with the Commission on November 24, 1982. MOC naturally filed a Motion to Dismiss, claiming the Bateses no longer were officers, directors or shareholders of MOC. The prospective assignee (Westerville) dismissed its application on September 5, 1985.

elsewhere, actually devote the claimed amount of time (40 hours per week) to MOC and WBBY(FM)? (3) Did Richard Nourse, in considering the facts pertaining to item (2), actually perform full-time duties for MOC and WBBY(FM) as the *Station Manager* of WBBY(FM)? (4) Did MOC falsely represent facts to the Commission concerning Richard Nourse's employment status in order to obtain a comparative advantage in the initial hearing proceeding?

13. Following four days of testimony in the remand hearing proceedings in July 1985, the ALJ reluctantly granted the application of MOC, concluding in pertinent part (SID, para. 76, emphasis added) as follows:

> If this were still a comparative proceeding the record developed in this phase of the case would be sufficient to warrant a substantial comparative demerit. *Bay Television, Inc.*, 85 FCC 2d 181, 185 (Rev. Bd. 1983). *Even in a non-comparative context, there is some question whether renewal of WBBY's license should be granted.* On balance, however, the presiding officer has concluded that denial of the application would be an action more severe than is warranted. Despite its several facets, the conduct in question amounted to what was in fact a single transgression: failure to disclose a material fact involving one aspect of its integration proposal. It was, moreover, mitigated by the fact that Richard Nourse continued to work at the station and for most of the relevant time period was in reasonable compliance with the commitment made in Mid-Ohio's failure to meet Commission standards regarding ownership integration. Thus, notwithstanding Mid-Ohio's failure to meet Commission standards regarding openness and fair dealing in the prosecution of its application, it is concluded that denial of the application for renewal of license is a more drastic action than the licensees' conduct warrants. Since there is no provision for consideration of a forfeiture, the censure expressed in the preceding paragraphs must suffice.

14. In the Exceptions and Reply pleadings now before us, the Commission's Mass Media Bureau argues vehemently for disqualification. MOC, with equal fervor, argues that any detrimental findings against it be set aside. MOC also argues that the *entire record*, must be examined prior to the issuance of. our Decision (correctly citing Section 556(d) of the Administrative Procedure Act (5 U.S.C. 556 (d)). As noted, *supra*, we have exhaustively conducted our own review and conclude that the relucant decision of the ALJ to renew the license of WBBY(FM) should be modified as indicated herein, pursuant to prevailing Commission policies.

15. In a letter dated May 28, 1982[11] to MOC principal Carl

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[11] Mass Media Bur. Exh. 8, p. 2.

Nourse, the then-counsel for MOC suggested that Richard Nourse be "installed" as "Station Manager" to bolster MOC's comparative posture. This suggestion was putatively accepted by MOC, and MOC thereafter relied upon the integration proposal of Richard Nourse in this alleged managerial position.[12] Thus, it is important to initially examine just what Richard Nourse actually did (or did not do) for WBBY(FM) in this capacity. As the ALJ perspicuously noted, the record in this proceeding is virtually devoid of documentary evidence with respect to the remand issue, and relevant evidence was adduced almost solely upon the testimony of various witnesses.[13] With respect to the actual duties and functions performed by Richard Nourse at WBBY(FM), the ALJ found that "The testimony is frequently less than specific, particularly regarding the time frame and the amount of time that [Richard Nourse] actually devoted to the tasks being described." (SID, para. 32). Thus, a summary of the more salient findings concerning Richard Nourse's activities is important.

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[12] At the commencement of the initial hearing on November 16, 1982, MOC submitted direct written testimony of Richard Nourse (MOC Exh. 2, pp. 9–10) which claimed, in pertinent part, as follows:

> As Station Manager for the station, Mr. Nourse assists the General Manger in overseeing the day-to-day operations of WBBY(FM). His responsibilities include assisting in the management of the station's business affairs, conducting personnel interviews, doing market research, overseeing EEO compliance, maintaining the station's payola file and assisting in the sales area. He is also in charge of public relations and station maintenance.
>
> Richard P. Nourse devotes 40 hourse or more per week to his work for Mid-Ohio and WBBY(FM) and to QNP's investment in Mid-Ohio. He proposes to continue this time commitment to the station.

[13] These witnesses included Carl Nourse, Richard Nourse, Bryan McIntyre (former "consultant" to MOC) and David Freeman (former "general manager" of WBBY). However, it is noteworthy that Richard Nourse was advised (apparently by counsel) to keep a "diary" of his activities relating to his activities at WBBY(FM). This potentially valuable documentary evidence was not available. The transcript reveals the following (Tr. 1468):

> [MOC COUNSEL]: . . . Were you requested to keep some form of writing commemorating the amount of work that you did for the station?
>
> [RICHARD NOURSE]: Yes.
>
> [MOC COUNSEL]: When, approximately, and in what time frame was the document kept and what was the document?
>
> [RICHARD NOURSE]: It's in the form of a diary which I, to this day, have no good explanation of why I screwed it up. But that's all I can say that I did. I was making—I don't know what I did to make that error.

16. On June 10, 1982 (a few days after the original hearing designation order was released), Bryan McIntyre was hired by Carl Nourse as a "consultant" for MOC. Initially, McIntyre worked as a liaison between Carl Nourse and then-counsel to MOC, as well as between Carl Nourse and the WBBY(FM) staff. McIntyre compiled material for the initial hearing and assisted in the preparation of some documents by providing information to the attorneys. He also reviewed documents which had been prepared by then-counsel for MOC for completeness and accuracy. McIntyre also began training Richard Nourse to be "Station Manager" at WBBY(FM), a position in which Richard would allegedly be working with the station's Public File, its EEO plan, its sales operations and with its programming. At the time, the person at WBBY(FM) with the title of "General Manager" was David R. Freeman, a former sales manager at WBBY(FM). (SID, paras. 33—34).

17. McIntyre and Richard apparently occasionally met and discussed station affairs. Sometimes the two would go to the business offices in Westerville or the studios in Sunbury to review various projects. Much of Richard Nourse's initial association with McIntyre consisted only of the latter explaining to Richard what McIntyre was doing at the station. Richard, in June 1982, allegedly worked on establishing certain personnel procedures and policies. In addition, it was claimed that he was "involved" with planning for the upgrading of WBBY's equipment and facilities. He purportedly worked on compensation programs for sales personnel to make the programs more conducive to keeping sales personnel at the station. However, he did not make any sales calls. (SID, paras. 35—36).

18. Richard purportedly "worked" with McIntyre on the preparation of an employee manual which attempted to codify such things as paid insurance, vacation and sick leave policy, and the like. Another alleged duty was the "supervision" and "maintenance" of the station's Equal Opportunity Employment Compliance File and the Payola File. Neither of the tasks took much time, because both could be accomplished by simply organizing the station's files. Thereafter, the files were essentially self-sustaining. Richard also claimed to assist in the development of a computer program which interfaced with the operation of the radio station and monitored, on a daily basis, the status and progress of *all* the family businesses—the radio station, the auto dealerships and the tennis club. He was also said to have

attempted the development of a computer program which would program WBBY(FM)'s music, based upon a card catalogue system which was in-place; however, the program could not be implemented due to hardware limitations which made the software program impractical. (SID, paras. 37-38).

19. After the Nourse family entity assumed control of WBBY(FM), management meetings were held on a weekly basis. Richard Nourse attended "most" of the meetings held during the summer of 1982. After beginning as a "station manager" trainee, Richard Nourse assumed the title and position of "Station Manager" about August 1982. Press releases were apparently issued naming him to the position. (SID, paras. 39—40).

20. During a one-month period (September 1982), Richard Nourse claims to have spent "five to seven hours" each week working on maintenance at the station. The station's physical plant was in poor condition. The studio was located in Sunbury, Ohio in a corn field; a long gravel driveway leading to the building was strewn with pot holes; brush had grown up around the building, and the area was littered with trash. With Richard Nourse's participation and "supervision," the trash was removed and the studio renovated. (SID, para. 42).

21. In September 1982, Richard "worked" with the station's program director on concepts for revamping the programming at WBBY(FM). During September and October 1982, he purportedly surveyed people concerning their jazz music attitudes, and allegedly sought to develop a repertoire which might be the foundation for the station's programming. The identification of different, mass-appeal music, led to the cataloging of music at the station. There were 20,000 albums, with eight to ten cuts each, to be catalogued. The process apparently ran for nine or ten months through the fall of 1982 and the spring of 1983. Other Nourse family members and Richard apparently typed the catalogue cards. (SID, paras. 43-44).

22. Richard Nourse was also apparently involved in the hiring of two announcers. Richard Nourse, Bryan McIntyre and Carl Nourse met with one of the announcers several times before he was actually hired. Richard Nourse purportedly prepared the employment agreement for the announcer who was hired as the morning personality. (SID, para. 46).

23. Near the beginning of 1983, Richard Nourse worked with McIntyre on plans to utilize newly-found office space for a receptionist's area, studio space, a conference room, a music library, and the like, and also worked on finding alternate space

for the sales offices and studios. Richard also worked with McIntyre in connection with some engineering matters at the station. These pertained to the selection and ordering of new equipment for the new studios when the studios were moved from Sunbury. However, this was no more than essentially a learning experience for Richard, involving such things as determining which equipment was superior and which was affordable. (SID, paras. 49-52).

24. However, the Mass Media Bureau argues that Richard's written testimony (set forth at note 12, *supra*) was false and misleading at the time that it was made. The Bureau claims, for example, that Richard's statement that, as Station Manager, he assisted the General Manager in overseeing the day-to-day operations of WBBY(FM) was false. McIntyre's testimony indicates that he did not feel "comfortable" with the reference to Richard Nourse as full-time Station Manager (Tr. 829), and that naming Richard as such was merely an exercise of just putting a title on a person (although McIntyre did indicate that he believed that Richard's activities were of a managerial nature) (Tr. 830). The Bureau observes that Richard never had an office (or even a desk) at any of WBBY(FM)'s facilities and was *never* on the station's payroll. With respect to Richard's original hearing statement that he was "assisting the station's General Manager" (purportedly David Freeman), the Bureau asserts that Richard's testimony at the remand hearing that he "meant" Carl Nourse when referring to the General Manger does not square with Carl Nourse's initial hearing testimony. Specifically, when Carl Nourse originally testified, Carl obviously meant David Freeman when he referred to meeting with the "General Manger" (Tr. 1133-36).

25. The Bureau also disputes the finding that Richard Nourse prepared the station's "employee manual," claiming that, although Richard Nourse contributed some information from other family businesses, McIntyre and Hodges were, in fact, those persons more actively involved in the preparation of the employee policies (Tr. 781-2, 959). Indeed, Carl Nourse had testified in November 1982 that he was responsible for creating the employee manual and setting station policies. (Tr. 219). In point of fact, Carl Nourse *changed* his testimony at the remand hearing to attribute these actions to Richard Nourse (Tr. 1216-7).

26. With respect to the format change attributed to Richard Nourse, the Bureau argues that the change was in reality as much Carl Nourse's ideas as anyone else's (Tr. 165-6, 767-9). Moreover, it was McIntyre and the station's program director who were

responsible for implementing the changes, not Richard Nourse. Thus, at the hearing in November 1982, Carl Nourse testified that the format change was his idea (Tr. 165-6, 1224). The Bureau holds that Carl Nourse originally claimed the credit for the format change in order to bolster his own integration proposal; however, at the remand hearing Carl Nourse attributed the credit for the format change to Richard Nourse in an obvious attempt to bolster his son's claim of participation in station affairs.

27. The Bureau further contends that the types of projects that Richard Nourse was involved in were, for the most part general interest matters that would be proprietal interests similar to those for any part-owner of a radio station. His asserted concern with the profits and losses of the station was similarly expressed for the family's tennis club and numerous car dealerships. With respect to the computer system, Richard Nourse spent a good deal of time looking for a system to be used predominantly by other family businesses and in negotiating for property to be purchased by the family corporation, QNP. (Tr. 1160-1166, 1175, 1407). Richard Nourse's claimed market research actually involved no more than asking people he encountered at Windsong Tennis Club (another Nourse family-owned business where Richard was employed full-time as general manager from 1978 until, he alleges, August 31, 1982). MOC Answers to Interrogatories, p. 8) about their concepts of jazz music (Tr. 1343). Richard Nourse's purported oversight of the station's EEO compliance and maintenance of the station's "payola" file involved only a few hours per month, at best. (Tr. 842, 1416-1418). Similarly, any input by Richard Nourse in the sales area was quite limited (Tr. 1141, 1245). Moreover, Richard Nourse was not in charge of public relations, although he may have had some limited public relations-type meetings. Also, he was not in charge of station maintenance, although he helped with the cleanup project at the station studio (Tr. 908, 1196).

28. Finally, with respect to the alleged activities of Richard Nourse as "Station Manager" of WBBY(FM), the ALJ made the following findings concerning the testimony of the former Sales Manager and General Manger of the station, David Freeman (SID, para. 58):

> Freeman's testimony can be summarized as follows: He stated that to his knowledge Richard was not involved in personnel decisions (Tr. 623) and had no knowledge that Richard ever interviewed any sales applicants. He did recall that Richard once suggested that a larger sales staff be hired. Tr. 624, 651. During the period that Freeman was at WBBY, he saw

> Richard at the station fewer than half a dozen times. Tr. 625. Freeman never saw Richard at the Sunbury studios but did see him several times at Quality Chevrolet. Tr. 626. Freeman only recalled seeing Richard at two management meetings after June 1982. Tr. 628. Freeman was not aware of any market research that Richard had done (Tr. 641) and considered Bryan McIntyre to be generally responsible for the EEO file and Payola file. Tr. 642-3. To Freeman's knowledge, Richard was not responsible for station maintenance although he was told by Carl that "the boys" cleaned up the Sunbury studio. Tr. 647-8. The concept of different music by different day parts evolved over a period of time with Hodges and McIntyre having the most input. Tr. 657-8. Although Richard did suggest some songs and albums, his suggestions were not implemented. Tr. 660. The station's logo was changed to "The Entertainment Alternative" based on suggestions made by Richard, although he did not suggest that particular logo. Tr. 666-8. To Freeman's knowledge, Richard was not involved in the selection of equipment. Tr. 661-3.

We note, however, that the ALJ found that the testimony of Brian McIntyre was "more reliable" with respect to Richard's activities than Freeman's, since McIntyre (the ALJ opined) was more knowledgeable about Richard Nourse's activities. Nevertheless, the ALJ specifically declared that he did not doubt Freeman's essential veracity (SID, para. 59).

29. Having examined what Richard Nourse might or might not have done on behalf of WBBY(FM) as "Station Manager", we now turn to the matters at the heart of this proceeding: the alleged Section 1.65 violations and related misrepresentations. Initially, in order to persuade us to add issues against MOC, the then-competing applicant, Metro, filed a Motion to Reopen the Record and to Enlarge the Issues on November 2, 1983, alleging that Richard Nourse was not, in fact, working at (or on behalf of) WBBY(FM).[14] Metro contended, in essence, as does the Bureau in

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[14] In support thereof, Metro alleged (motion at 6-7), *inter alia*, the following:

> In June 1983, Richard P. Nourse was arrested for failure to possess a valid motorcycle operator's license. He identified his home address as Marietta and his employer as 'Pioneer Chevy, Marietta, Ohio.' . . . He was again arrested for a traffic infraction in August 1983 in the vicinity of Marietta for driving in excess of posted speeds. Although he did not list his employer, he did list his position as one of 'sales', inconsistent with the position of 'station manager' he allegedly occupies at WBBY.
>
> Metro retained the services of Joseph E. Driscoll, a licensed private investigator to ascertain the employment status of Mr. Nourse. On October 13, 1983, Mr. Driscoll called Quality Chevrolet, Inc., Columbus, Ohio, an automobile dealership owned substantially by Carl R. Nourse . . . He spoke to Donna Sickle and later to Roger Freeman. He asked both persons for Richard Nourse, but was informed that he was in Marietta working at an auto dealership. Ms. Sickle identified the dealership as 'Pioneer', and Mr. Freeman identified it [as] Pioneer Cadillac-Chevrolet. Mr. Freeman and Ms. Sickle both

its exceptions, that MOC made a conscious and disingenuous effort to conceal Richard Nourse's true employment situation from the Commission by submitting false and misleading information as follows: (1) On September 1, 1982, MOC filed answers to interrogatories stating that Richard Nourse no longer worked at Pioneer Chevrolet, Marietta, Ohio; (2) On October 20, 1982, MOC prepared its Exhibit 2 stating that Richard Nourse had worked at Pioneer Chevrolet in the summer of 1982 as Acting General Manager but did *not* state that Richard Nourse was again working the same amount of time at Pioneer Chevrolet with added responsibilities; (3) On October 25, 1982, MOC supplemented its answers to interrogatories by stating that Richard Nourses' time devoted to WBBY(FM) had "varied" but failed to state that Richard Nourse was indeed working as General Manager of Pioneer Chevrolet; (4) On November 16, 1982, Richard Nourse testified at the hearing that his written testimony (MOC Exh. 2) was true and correct without mentioning his work at Pioneer Chevrolet; (5) On January 25, 1983, in its reply findings, MOC stated that Richard Nourse was fulfilling his commitment to the station at the present time even though Richard Nourse was by then spending time each week at Pioneer Chevrolet; (6) On October 17, 1983, Mid-Ohio stated in exceptions that Richard Nourse was working more than 40 hours per week as station manager assisting the General Manager in all areas of station operation when in fact he was spending less time than before on station affairs and was working each week at Pioneer Chevrolet.

30. With its November 16, 1983 Opposition to Metro's Motion to Enlarge Issues, MOC submitted a declaration of Richard P. Nourse. This declaration is also important in that it forms one of the principal bases for MOC's defense at the remand hearing. In pertinent part, Mr. Nourse's statement (Attachment A at 1–3) claims the following:

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acknowledged that Mr. Nourse usually could be reached there during the week, and Mr. Freeman stated that Mr. Nourse 'runs the store' at Pioneer . . . Mr. Driscoll then visited the showroom of Pioneer Chevrolet-Cadillac located on Newport Pike, Marietta, Ohio, on October 17, 1983. He spoke to one Evelyn Decker, who informed him that Mr. Nourse was in Charleston, West Virginia, that day for a Chevrolet sales meeting. She stated that he was usually present on the Pioneeer premises Monday through Saturday, and she gave Mr. Driscoll several business cards, one of which is attached to his Statement. She stated that Richard Nourse's position at Pioneer was that of 'manager'.

My family received Commission consent to take control of WBBY(FM) in June 1982. The actual transfer of control occurred in August 1982. During the summer of 1982, I worked on a part-time basis at Pioneer Chevrolet-Cadillac, Inc. in Marietta, Ohio. Pioneer Chevrolet is an automobile dealership and is owned by my father, Carl C. Nourse, and Paul Aselin. Paul Aselin worked as General Manager and Dealer of the dealership. In the summer of 1982, Mr. Aselin took a leave of absence because his personal and business affairs required that he be in Columbus, Ohio much of the time. At the request of my father and Mr. Aselin, I worked at the dealership and oversaw its operation on their behalf during that summer.

In September 1982, Mid-Ohio filed answers to Metro's interrogatories which disclosed that I had worked at Pioneer Chevrolet during the summer of 1982. As of September 1, 1982, I was no longer working at Pioneer Chevrolet and Mid-Ohio's answers reflected that fact.

After Mid-Ohio's initial answers were filed, Mr. Aselin again asked me to help out at Pioneer Chevrolet. In September 1982, I began to fill in for Mr. Aselin at the dealership. Because the time I spent at Pioneer initially took more time than expected, Mid-Ohio filed supplemental answers to Metro's interrogatories in October 1982 disclosing the fact that my time commitment to WBBY(FM)'s affairs had varied since the original answers had been filed. In the supplemental answers filed October 25, 1982, it was correctly stated that, at that time, I was devoting 40 hours or more per week to station affairs and intended to devote that amount of time after Mid-Ohio's application was granted. Metro easily could have explored this matter and received forthright answers by simply asking me at hearing, rather than resorting to private investigators after ignoring me at hearing.

From October 1982, through December 1982, I continued to devote more than 40 hours a week to station affairs. During this period, I also spent approximately two days per week helping Mr. Aselin at Pioneer Chevrolet.

In mid-January 1983, Mr. Aselin's personal and family problems became more serious. He told me that he had to spend more time in Columbus and that he could not run the dealership without more help. At Mr. Aselin's request, and in light of the personal crisis that he faced, I agreed to spend an additional day per week at the dealership. Between January 1983 and September 1983 I filled in for Mr. Aselin at Pioneer Chevrolet approximately three days per week. I felt that I was helping Mr. Aselin only on a temporary basis, pending the grant of WBBY's renewal. During this period I continued to work between 30 and 40 hours per week on matters related to the operation of WBBY(FM).

In September 1983, Judge Conlin denied Mid-Ohio's renewal. Since that time to the present, I have continued to devote approximately 30 hours per week on station affairs. However, because my commitment to work at the station was contingent on the grant of our application, I believed I could spend more time working at Pioneer Chevrolet. Subsequent to the denial of the renewal, I became General Manager at the dealership where I spend 36 hours a week.[15]

31. Shortly before the filing of Metro's Motion to Enlarge Issues, Exceptions to the Initial Decision were filed by the parties with the Review Board. Pursuant thereto, Oral Argument on these Exceptions was heard on January 12, 1984. During this proceeding the Review Board evidenced its concern with the proposed integration representations of Richard Nourse.

> [BOARD MEMBER JACOBS]: Before you sit down, and speaking of Richard Nourse, is it your contention that he spends 40 hours a week at Pioneer Chevrolet and 30 hours per week in Westerville, and makes a 200 mile round trip commute.
>
> [COUNSEL FOR MOC]: We have laid out his hours, and his schedule and his commuting time in the affidavit submitted to you in opposition to the motion to reopen. As I understand it, it would be improper for me to discuss that motion at this time. It was not designated for oral argument, but I can say that his commitment has not lapsed, his commitment has not lessened and it has been renewed in the very pleadings before you.
>
> [BOARD MEMBER]: Unfortunately, everything that is filed here is subject to the oral argument. It's not merely the exception. I meant apart from our studying the affidavit.
>
> [COUNSEL FRO MOC]: He is presently serving 30 hours in connection with station business, discharging his obligation. He fully intends to bring that up to 40 hours as he was doing at the time of hearing as soon as Judge Conlin's decision is reversed and the Nourse family can be put fully into control of the station.
>
> [BOARD MEMBER]: Well, how does he manage to succeed in doing 30 hours 100 miles away?
>
> [COUNSEL FOR MOC]: I do not have independent—
>
> [BOARD MEMBER]: What does the affidavit say?
>
> [COUNSEL FOR MOC]: The affidavits indicate that he works an abbreviated schedule at the car dealership and commutes back up to the

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[15] In its Exceptions (at 3), the Bureau also claims that this statement compounds the misrepresentations of MOC:

> [On] November 14, 1983, in an affidavit in response to the petition to enlarge issues, Richard Nourse stated that he continued to work 30–40 hours per week on station affairs even though [he] had married and a new General Manager at WBBY had been hired. Within two weeks he had moved to Marietta with his wife and no longer commuted to the station. [Moreover, the] fact that Richard Nourse moved to Marietta and by his own admission was no longer involved in the day-to-day operation of WBBY, was not reported to the Commission until January 1985. Richard Nourse's move and termination of his involvement at WBBY was reported only after the issue was raised by Bureau counsel at Richard Nourse's deposition.

Columbus metro area in order to do business in connection with the station. I also understand, although this is not in the record, that he takes care of certain station affairs outside of Columbus interviewing prospective employees.

[BOARD MEMBER]: You mean he travels to Westerville, spends 30 hours there and then comes back or does he come back the same night that he travels?

[COUNSEL FOR MOC]: I don't know the answer to that.

* * *

[BOARD MEMBER]: But, what troubles us is, I think, the impression given at the hearing that Richard was going to continue right up until the time of grant with that 40 hour commitment. Not for him to be saying, well, at the time of hearing, I'm working 40 hours, and then who knows what'll happen, but at the time of grant, I'll again be working 40 hours.

* * *

[BOARD MEMBER]: Well, the hearing was in November of 1982, wasn't it?

[COUNSEL FOR MOC]: Are you speaking to me, sir?

[BOARD MEMBER]: Yes.

[COUNSEL FOR MOC]: Yes, it was.

[BOARD MEMBER]: And, in October 1982, he already was working part time at Pioneer two days a week.

[COUNSEL FOR MOC]: We had indicated in an amended answer to interrogatories that his hours had varied from that which was expected and we did so as soon as we were informed of it to put all parties on notice. But, what, in fact, happened, is that Metro simply waived its cross [examination], did not explore the issue at all and got no answers.

[BOARD MEMBER]: I understand. But the hearing occurred in November 1982 and it's your own client's testimony that from October to December 1982 he was working two days a week at Pioneer and it's your contention in response to the motion to reopen, that beginning in January 1983 he began working how many hours? That was January, wasn't it?

[COUNSEL FOR MOC]: He did work at Pioneer in January.

[BOARD MEMBER]: Well, what's wrong with what the chairman just said? That no sooner was the hearing over that he increased his amount of time at Pioneer?

[COUNSEL FOR MOC]: Well, I believe that the affidavit sets out the emergency loads, independent of any Richard had control over, which was a personal and family crisis in the then existing manager at Pioneer.

> [BOARD MEMBER]: No, except they didn't tell anyone about it.
>
> [COUNSEL FOR MOC]: He considered it a temporary measure to try to pull Pioneer through.
>
> [BOARD MEMBER]: It lasted for nine months and then he became very disappointed when he lost the initial decision and switched to full time.
>
> [COUNSEL FOR MOC]: That's what it is. The affidavits must speak for themselves since I have no independent facts to give you.
>
> [BOARD MEMBER]: Well, all I'm saying is that beginning in October, at least October 1982 to the present, it appears that Richard has been spending an increasing amount of time at Pioneer Chevrolet and never indicated that he was going to be increasing it, presumably because he thought it wasn't important.
>
> [COUNSEL FOR MOC]: *He and his father both considered it not decisionally significant.* (Tr. 479–484; emphasis added.)

32. Shortly after this colloquy and the routine exchange of pleadings, we added the issue noted *supra* at paragraph 1. The ALJ concluded that Richard Nourse's changed employment status (working at Pioneer Chevrolet) "was a matter of decisional significance since it was material to the ownership integration" credit claimed by MOC in the initial hearing; thus, the failure to report same was a clear violation of Section 1.65 of the Commission's Rules (SID, para. 69). However, with respect to the misrepresentation aspect of the designated issue, the ALJ decided "[o]n balance ... there is substantial evidence to support the conclusion that Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station affairs." (SID, para. 71; footnote omitted). The ALJ also concluded that the failure to report the changed employment circumstances of Richard Nourse was only a "single transgression: failure to disclose a material fact involving one aspect of its [MOC's] integration proposal" (SID, para. 76).

33. The exceptions of the Bureau have been noted hereinabove. However, MOC, *inter alia*, while concurring with the ultimate conclusion to grant the renewal application of WBBY(FM), excepts to the findings and conclusions that MOC violated Section 1.65 of the Commission's Rules. MOC claims that these findings and conclusions were based upon speculation and surmise; that the ALJ failed to consider all material facts and applied a "different standard" to MOC; and that the ALJ failed to follow existing precedent. MOC further finds fault with the

exceptions filed by the Bureau, claiming that the Bureau's argument that there was more than a "single transgression" (that is, multiple misrepresentations of Richard Nourse's changed employment status) is merely based upon evidentiary fragments, viewed in isolation and "out of context." Having examined at length the entire record herein and considered all the decisionally significant exceptions filed by the parties, we reach the following conclusions.

34. *Conclusions*: We concur with the ALJ that it is patently clear that MOC substantially violated Section 1.65 of the Commission's Rules. MOC, in the initial hearing proceeding, argued repeatedly that its existing and ongoing integration of ownership with management was a highly significant factor in favoring grant of its renewal application. (SID, para. 65). MOC stridently stressed that its integration, unlike that of its then-competing license challenger, Metro, was no merely a proposal but "*it is living, breathing integration realized*" (MOC Exceptions to Initial Decision, p. 17; emphasis added), since Mrs. Nourse and Richard "have been devoting more than forty hours per week to station affairs" (*Id.*). Nevertheless, as the ALJ concluded, it is undisputed that MOC did not disclose the fact (until November 1983) that Richard Nourse had taken the position as General Manger of Pioneer Chevrolet in Marietta, Ohio, some 120 miles distant from Westerville, in September 1982. Even then, the disclosure of Nourse's employment status was forthcoming only in response to a Petition to Enlarge Issues filed by Metro, *after* the record in the initial proceeding had been closed. (SID, para. 65).

35. Clearly, Section 1.65 (47 CFR § 1.65) of the Commission's Rules requires applicants for Commission authorizations to report substantial changes in matters of decisional significance.[16] The function of Section 1.65 is to ensure that the information reported

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[16] Section 1.65 of the Commission's Rules provides the following:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47.

in applications remains substantially accurate and complete in all significant respects and to ensure that fair administrative practice is observed in comparative hearing proceedings. The rule is intended to apply (1) "where there has been a substantial change and (2) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest." *Reporting of Changed Circumstances*, 3 RR 2d 1622, 1624 (1964). More specifically, applicants are obliged to report "any substantial change in circumstances pertaining to . . factors urged as a basis for a grant or a comparative preference." *Id.* Excluding from the scope of the rule "minor changes which would have no significance" and even "some material matters [which] normally fluctuate on a day-to-day basis," the Commission has characterized the intent of Section 1.65 as requiring disclosure of changed circumstances "which *may* make a difference from the standpoint of the public interest, and those *which the Commission should be aware of in order to reach a realistic decision.*" 3 RR 2d at 1625 (emphasis added). *See Allied Broadcasting Co. v. FCC* 435 F.2d 68 (D.C. Cir. 1970).

36. Herein, Richard Nourse's changed circumstances (General Manger of Pioneer Chevrolet) was a critical factor in assessing his and MOC's integration proposal. MOC claims that since Richard purportedly continued to devote "40 hours per week" to WBBY(FM), his active stewardship of Pioneer was not a substantial change of material significance. In rejecting MOC's defense out of hand, the ALJ properly concluded:

> "In the first place, [Section 1.65] specifically provides that applicants are 'responsible for the continuing accuracy and completeness of information furnished . . . in Commission proceedings involving a pending application.' In answers to interrogatories filed on September 1, 1982 Mid-Ohio represented that Richard Nourse 'no longer works at Pioneer Chevrolet.' This statement was accurate at the time it was made; but later that month [in fact, within a few days] he resumed his part time employment at Pioneer Chevrolet, and even now continues to work there. Mid-Ohio's obligation to correct the record in this respect seems obvious." (SID, para. 67).

37. It is suggested that the Nourses elected not to reveal Richard's employment status on advice of counsel. Br. at 9-10. It is well-settled that applicants are charged with the responsibility of keeping their applications current, 47 CFR § 1.65, and that they "cannot abdicate [that] responsibility to [their] legal counsel." *RKO General, Inc.*, FCC 86R-19, released April 3, 1986, at para. 4; *see Vela Broadcasting Co.*, 102 FCC 2d 997, 1000 (Rev.

Bd. 1985). Moreover, MOC's own counsel indicated that it was Carl and Richard Nourse's decision not to report this significant information. See para. 31, *supra.* Additionally, as is the case herein, where a representation is made that a principal will be integrated on a 40 hour per week basis, other demands on the applicant's time are obviously relevant in determining the credibility of the proposal, particularly where they regularly involve travel outside the immediate area of the station. *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 701 (Rev. Bd. 1984) (fulltime integration credit not given where principal, a state legislator, spent two months per year at state capitol); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11–12 (Rev. Bd. 1978) (integration disallowed where principal resided and managed a station in a community located three hours round trip drive from community of license). *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 418–419 (Rev. Bd. 1984); *Family Broadcasting Group*, 93 FCC 2d 771, 778 (Rev. Bd. 1983). Thus, Richard Nourse's significantly changed vocational status, involving "weekly" two or three day pilgrimages (at a minimum) to Marietta, Ohio, some 120 miles from Westerville (with a driving time of at least two and one-half hours), was a patently critical factor to be considered in assessing the likelihood that his integration proposal would be implemented. Therefore, we hold that MOC seriously violated Section 1.65 of the Commission's Rules by its deliberate failure to report this material information.

38. Turning to the misrepresentation aspect of the remand issue, we must address what Richard Nourse did, or did not do, on behalf of WBBY(FM). It is obvious that, if this were a comparative proceeding, we could now allow credit for management participation in station activities by Richard Nourse, since the bulk of his duties and activities were manifestly nonmanagerial in nature, and "without management and policy functions an applicant's principals do not merit ownership integration credit."[17] Of course, since this is no longer a comparative proceeding, this consideration is essentially moot. However, the activities of Richard Nourse at WBBY(FM) *are* an important consideration with regard to the key conclusion of the ALJ that "Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station

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[17] *See Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324, 58 RR 2d 1488, 1489 (Rev. Bd. 1985); *Apogee, Inc.*, 99 FCC 2d 979, 987, 57 RR 2d 1585, 1591 (Rev. Bd. 1985).

affairs" (SID, para. 71). We agree with the Bureau that the record herein, as a whole, plainly reveals that Richard Nourse did not function in any true managerial capacity and, in fact, did not live up to his commitment to perform services for WBBY(FM) on a full time basis. Hence, we find that the Bureau's exceptions, delineated in paras. 24–27, *supra,* are well taken and accurate. It is obvious that the representations to the Commission that Richard was, on an ongoing basis, devoting full-time to the affairs of WBBY(FM) (and the Nourse family entities relating to the operation of the station) were no more than hollow and deceptive attempts to purloin a comparative preference in the initial hearing proceeding.[18] *Cf. Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680–683 (Rev. Bd. 1986) (applicant principal who ignored "full time" management pledge to SBA found untrustworthy on "full time" integration pledge).

39. We hold that the entire record, and the facts and circumstances leading up to this unavoidable conclusion, pellucidly reveal that MOC had every motive and intent to falsely portray its integration proposal to gain a comparative advantage over its then-existing competing applicant, Metro. Having been dealt a winning hand[19] at the original hearing proceeding by Metro's election to not cross-examine Richard Nourse and his representations of full-time employment at WBBY(FM), MOC was subsequently trumped by Metro's diligent investigation. At the remand hearing, the principals of MOC chose to "stonewall," and continued to represent on numerous occasions that Richard was devoting "full time" to WBBY(FM). Thus, with respect to the ALJ's splanchnic observation that MOC's repeated failure to

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[18] The evidence herein also demonstrates that Carl Nourse (under whose strong influence, dominion and control Richard Nourse acted) likely had no intention of installing Richard as Station Manager, or allowing him to function as same. We suspect that Carl Nourse's underlying perception and beliefs about the operation of the station can best be demonstrated by his own testimony concerning the running of his automobile businesses and utilization of car salesmen:

> . . . [B]asically you give them a straw hat, a cane, you give them no place to sit down, you keep them on their feet, they're moving, you have a telephone in the middle of the floor. They sell their relatives the first ten days. They sell their friends the next 20 days and if at the end of six weeks they haven't gotten into the [selling] of things you move them on and bring in another one. (Tr. 1097)

[19] MOC's principals must have felt like high-stakes gamblers who, playing Baccarat (Chemin de Fer), turn over the banker's cards to reveal the highest hand, a "natural nine". Such an event usually evokes the fulgid cry of "banco". Herein, after reviewing the entire record, we can only perceive the rumblings of "bunco".

"come clean" and reveal Richard's employment at Pioneer Chevrolet was no more than a "single transgression," we concur with the essence of the Bureau's counter-argument that MOC did, in fact, willfully and repeatedly continue its misrepresentations on numerous occasions more specifically delineated hereinbelow.

40. MOC's answers to interrogatories dated September 1, 1982, that Richard Nourse no longer worked at Pioneer Chevrolet, *on that date*, may have been *technically* correct. However, Richard's own statement, set forth at para. 30, *supra*, reveals that, within a matter of a few days, he was back in Marietta, Ohio, managing the Nourses' automobile dealership. Additionally, MOC should have disclosed this pertinent and significant fact on numerous subsequent occasions. These other occasions include the following:

> A. *October 20, 1982:* Mid-Ohio prepared Exhibit 2 stating that Richard Nourse had worked at Pioneer Chevrolet in the summer of 1982 as "Acting" General Manager but did not state that Richard Nourse was *again* working the same amount of time at Pioneer Chevrolet with added responsibilities.
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> B. *October 25, 1982:* Mid-Ohio supplemented its answers to interrogatories by stating that Richard Nourse's time devoted to WBBY had "varied" but failed to state that Richard Nourse was working (at least) two days per week as General Manager of Pioneer Chevrolet.
>
> C. *November 16, 1982:* Richard Nourse testified at the hearing that his written testimony, Mid-Ohio, Ex. 2, was true and correct without even mentioning his managership of Pioneer Chevrolet.
>
> D. *January 25, 1983:* In its reply findings, Mid-Ohio stated that Richard Nourse was "fulfilling his commitment" to the station at the present time even though Richard Nourse was by then spending (at least) three days per week at Pioneer Chevrolet.
>
> E. *October 17, 1983:* Mid-Ohio stated in its exceptions to the ID that Richard Nourse was working more than 40 hours per week as "Station Manager" assisting the General Manager in all areas of station operation, when in fact he was devoting less time than before on station affairs and was now spending at least three days per week as General Manager of Pioneer Chevrolet.
>
> F. *November 16, 1983:* In a declaration in response to Metro's motion to enlarge issues and reopen the record, set forth in pertinent part *verbatim et literatim* at para. 30, supra, Richard Nourse stated that he continued to work 30–40 hours per week on station affairs even though, in fact, a new General Manager had been hired at WBBY(FM). Also, within two weeks thereafter he had moved to Marietta with his new wife and no longer commuted to the station.

Indeed, the fact that Richard Nourse had permanently motored to Marietta and Pioneer Chevrolet, and by his own admission had exhausted of the day-to-day operation of WBBY, was muffled and not disclosed to the Commission until January 28, 1985. See MOC Motion for Summary Decision, filed January 28, 1985, at 22. Further, Richard Nourse's move and vocational trade-in was disclosed *only* after the question was raised by Bureau counsel at Richard Nourse's deposition on December 19, 1984. See *id.*, Attachment No. 2. It was then abundantly clear that Richard had not been the spark plug he claimed to be at WBBY(FM); he was a simple hood ornament in Westerville, while the rest of the vehicle was parked in Marietta.

41. The testimony at the remand hearing provides further evidence of MOC's continuing deceptions before the Commission. At the remand hearing, when Carl Nourse was questioned about his testimony at the original hearing proceeding that Richard Nourse, as part of his full-time managerial activities, prepared WBBY(FM)'s "employee manual," the record reveals the following (Tr. 1217, emphasis added):

> [BUREAU COUNSEL]: Can you explain [why] at the hearing there you testified that *you* created the employee manual and *now* you say that it was Dick's idea?
>
> [CARL NOURSE]: No excuse. The testimony as given today is correct. I erred.

Indeed. Further, when the ALJ cross-examined Carl Nourse concerning his initial hearing representations that David Freeman was the purported "General Manager" (under whom Richard Nourse allegedly worked), the following colloquy ensued (Tr. 1134–35; emphases added):

> [CARL NOURSE]: Frankly I never considered Freeman as general manager at the operated function and was only held accountable and was even paid as the sales manager.
>
> [JUDGE CONLIN]: Well, when you said in your testimony that you consult with the station's general manager, *who* did you have in mind?
>
> [CARL NOURSE]: I've really never had that question posed to me until this moment.
>
> [JUDGE CONLIN]: Well, until this moment, meaning the last day or two that *you* asserted that *you* were general manager of the station. What I want to know is, in that testimony, met frequently with the station's general manager, *who* were you referring to?

[CARL NOURSE]: I never, never, never said that Freeman had the title revoked.

[JUDGE CONLIN]: *Look, I just want an answer to my question.* Meeting frequently with the station's general manager is part of your testimony. *Who* is the individual *you* had in mind when *you* were making that statement?

[CARL NOURSE]: The person—you won't let me qualify him—

[JUDGE CONLIN]: *Just tell me the answer. It's a very simple question.*

[CARL NOURSE]: You're asking me *who* I was meeting with as general manager—

[JUDGE CONLIN]: *Who* did *you* have in mind when you made that statement at the hearing in Columbus. Meeting frequently with the station's general manager. Who did you expect me and everyone else in the hearing room to think that person was. Surely not Carl Nourse?

[CARL NOURSE]: Freeman had the title of General Manager.

[JUDGE CONLIN]: So, in other words—well, you tell me. *Just answer my question directly. Who* were *you* referring to in that sentence?

* * *

[CARL NOURSE]: —as it is structured there that's in the confines of the public knowledge of the station's operations he was the—

[JUDGE CONLIN]: *Don't qualify it. Answer my question directly. It's a very simple question and I'm getting tired of your equivocating.* Just tell me what person you had in mind when *you* made that statement? Give me a name!

[CARL NOURSE]: Freeman.

[JUDGE CONLIN]: All right. Is that your answer?

[CARL NOURSE]: *That's the answer I'll give.*[20]

42. In sum, while we concur with the ALJ's conclusions concerning the failure of MOC to notify the Commission of the material and significant changed circumstances regarding Richard Nourse's employment activities, we must modify his conclusions pertaining to the misrepresentation aspects of the remand issue. We believe that the record herein conclusively demonstrates that the Nourses and MOC had every motive and intent to deceive the

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[20] It may be posited that Mr. Nourse's oily evasiveness and continued efforts to grease the wheels of administrative due process precludes a sound determination of who was, in fact, WBBY(FM)'s "mystery manager." In any event, it is doubtful that it was Chevrolet's "Mr. Goodwrench."

Commission in order to purloin every comparative advantage it could garner at the initial hearing proceeding. It is incredible to believe that Richard Nourse concurrently devoted full time to MOC, WBBY(FM), and the Nourse family business entities related thereto, as MOC represented prior to, during, and after the original hearing. Even when presented with numerous opportunities to "come clean" and clear the record, MOC and the Nourses continued to dissemble, obfuscate and waffle in a vain attempt to force the facts to fit their representations; or, as the Bureau aptly phrased it, they "continued to stonewall and evade the truth at the remand hearing". Br. at 13. Given motive and intent; the changed testimony at the renewal hearing; the lack of actual managerial activities, actions, and duties of Richard Nourse with respect to the day-to-day operation or WBBY(FM); the inherently incredible testimony that Richard, in essence, peregrinated frequently from the family's automobile dealership in Marietta, Ohio, some 120 miles from WBBY(FM); the fact that Richard was more than actively involved in numerous other family businesses, and did not maintain an office or a desk at the radio station, and was not even paid by WBBY(FM); and, the testimony of all the non-family member witnesses, we can reach no other conclusion but that this concatenation of facts and circumstances clearly reveals MOC willfully and repeatedly intended to, and did, deceive the Commission.

43. *Ultimate Conclusion:* We concur with the ALJ that the failure of MOC to disclose Richard Nourse's employment at Pioneer Chevrolet was misleading and lacking in candor. (SID, para. 74). A licensee's record of noncompliance with the Commission's Rules provides direct evidence of anticipated future behavior as a public trustee. The record in this proceeding reveals direct evidence of MOC's total disregard for the need to be truthful and honest with the Commission. MOC's violation of Section 1.65 of the Commission's Rules, and repeated lack of candor before the Commission, especially in a hearing proceeding, are indicative of its future behavior. It is well-settled that in order to discharge its duties effectively, "the Commission must, of necessity, rely upon the statements and submissions of its licensees . . . . The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied*, 39 FCC 2d 1099 (1973), *rev'd on other grounds sub nom. Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196 (D.C. Cir. 1974). *See also FCC v.*

WOKO, Inc., 329 U.S. 223, 227 (1946). Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness and accuracy of the submissions made to it. *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985); *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). It is manifest that applicants before the Commission "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *Id.* at 232. Herein, the record evidence, as a whole, establishes that MOC conducted a pattern of deliberate and repeated violations of Section 1.65 of the Commission's Rules. This violation of Section 1.65 undermined the administrative fairness in the initial comparative hearing by withholding pertinent information about MOC and its composition from the Commission and Metro during the hearing proceedings. *See Bay Television, Inc.*, 95 FCC 2d 181 (Rev. Bd. 1983), *review denied*, FCC 85-58, released March 25, 1985, *aff'd by judgment (mem.) sub nom. Home TV, Inc. v. FCC*, No. 85-1256 (D.C. Cir. March 27, 1986).

44. With respect to the lack of candor on the part of MOC, such a conclusion can in and of itself lead to the sanction of disqualification. *RKO General, Inc. v. FCC, supra*. The Commission has held that false statements in the course of the hearing process are, in and of themselves, of substantial significance. *Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 699 (1972), *aff'd sub nom. Chaconas v. FCC*, 486 F.2d 1314 (D.C. Cir. 1973). Additionally, lack of candor need not be specifically designated as a hearing issue because "truth and candor are always in issue." *William M. Rogers*, 92 FCC 2d 187, 199-201 (1982); *The Old Time Religion Hour, Inc.*, 95 FCC 2d 713 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1984), *review denied*, FCC 85-104, released March 5, 1985, *review of recon. dismissal dismissed*, FCC 86-165, released April 15, 1986.

45. We are fully aware that we are now governed by the provisions of the Commission's recently-released *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement)* (Gen. Docket No. 81-500); *Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees* (BC Docket No. 78-108), 102 FCC 2d 1179 (1986). Therein, the Commission directed that all proceedings currently before it should generally

be resolved consistent with the policies set forth in the *Character Policy Statement*. Moreover, we have recently been monished by the Commission that our perhaps somewhat wistful suggestion in another proceeding that demerits might still be awarded in some circumstances is clearly not correct. *Broadcast Associates of Colorado*, FCC 86-215, released May 9, 1986, at note 5, *citing Professional Radio, Inc.*, 59 RR 2d 1173, at note 11 (Rev. Bd. 1986). Thus, we are faced with the ultimate determination of whether or not MOC is qualified to be a broadcast licensee under the clear guidelines of the *Character Policy Statement*.

46. In its *Character Policy Statement*, the Commission succinctly declared (102 FCC 2d 1179, 1209-11):

> We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.
>
> * * *
>
> As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.
>
> * * *
>
> We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

47. In this era of deregulation, the Commission now requires very little of its licensees. However, it is patently clear from the foregoing provisions of the *Character Policy Statement* that honesty and forthrightness remain of paramount concern to the Commission. Herein, we have concluded that MOC manifestly has not exhibited these important traits. The preponderance of the record evidence, as a whole, establishes that MOC conducted a pattern of willful, deliberate, and repeated violations of the Commission's Rules. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981).[21] MOC has violated Section 1.65 of

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[21] Our finding of a serious lack of candor is also consistent with the higher-than-usual standard of clear and convincing evidence (*Bellingham Television Associates, Ltd.*, 59 RR 2d 978, para. 6 (Rev. Bd. 1986)), which one Board Member believes is applicable in renewal cases involving either sensitive lack of

the Commission's Rules, it has exhibited a substantial lack of candor in hearing proceedings, and has repeatedly misrepresented crucial facts to the Commission. There are perhaps thousands of potentially qualified broadcast licensees who could properly deal with the Commission under its few remaining rules and regulations; however, it is obvious that MOC is not one of them. Thus, in light of the foregoing we hold that MOC has not demonstrated that it is qualified to be a broadcast licensee.

48. We are not unmindful of the harsh result reached herein; however, we unanimously agree that a significant sanction must be accorded this licensee. To allow MOC to profit from its egregious wrongdoing would be unthinkable. As the Commission's own Mass Media Bureau noted in its Exceptions, to grant an unfettered renewal of the license of WBBY(FM) would "send a signal to Commission licensees that . . . deceptive and dishonest conduct is acceptable." Br. at 9. Under the clear language of the extant *Character Policy Statement*, existing or potential Commission licensees are either qualified or they are not qualified. Nevertheless, the eloquent observations expressed in note 1 to the attached separate statement are well taken. Thus, we believe that in this proceeding it is for our superiors to accord any lesser sanction short of outright denial.

49. ACCORDINGLY, IT IS ORDERED, That the application for renewal of license of WBBY(FM), Westerville, Ohio, filed by Mid-Ohio Communications, Inc. (File No. BRH-790601F6), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

Separate Statement of Board Member Norman B. Blumenthal with Board Chairman Marino joining in Note 1.

I endorse the laborious and meticulously documented decision penned by Board Member Esbensen. As a former (and recent) broadcast licensee himself, the hard decision to apply the terminal sanction of non-renewal has surely given him at least as much

candor or constitutional issues. *See* Tr. 1478–1483, and *Broadcast Associates of Colorado*, 100 FCC 2d 616, 625 (Rev. Bd. 1985) (dissent), *reversed* FCC 86-215, released May 9, 1986. *See also David Hildebrand*, 92 FCC 2d 1241, 1243–1244 (Rev. Bd. 1983), and *Faith Center, Inc.*, 94 FCC 2d 756, 759–760 (Rev. Bd. 1983). *Cf. Alan K. Levin*, 97 FCC 2d 1, 5–6 (Rev. Bd. 1984) (subsequent history omitted).

occasion for pause as it does all Commission decisionmakers. *Compare, e.g., Stearns County Broadcasting Company, Inc.*, FCC 86R-40, released June 25, 1986 (reversing ALJ disqualification of licensee). A finding of "unqualified" is severe; a "blunderbuss" in the words of Judge Mikva.[1] On the other hand, it would be—no doubt—galling for former, and current, broadcasters who spend considerable time, money and attention to the regulatory responsibilities imposed by the Commission were we to renew the Nourses, whose attitude towards our most basic responsibility is, to put it mildly, "lump it." Not only would no one in control of their senses buy the proverbial "used car" from them, they would be equally unsound to extend a particle of trust in anything valued at more than, say, a balsa nickel. As is clear from this decision and the underlying record, "truth" to this licensee is purely a metaphysical construct, a negotiable condition—not unlike the condition or history of a used Chevrolet. We are awarding broadcast licenses worth over seven figures; attempts to steal one from a competing applicant with material untruths cannot be abided. *See generally Character Policy Statement*, 102 FCC 2d 1179 (1986) (*passim*).

As the decision accurately observes, *ante*, paras. 45-47, the Commission's recent *Character Policy Statement* deemphasizes much non-FCC misconduct, but coterminously apotheosizes candor and truthfulness to the Commission as the most reliable index of licensability. *See, e.g., id.*, at 1195-1198, 1209-1211. We believe that the Commission's *Character Policy Statement* means what it says; anything else rudely suggests a lack of candor on the part of the agency itself. That, of course, is unthinkable, as witness the *Character Policy Statement's* reiteration of the principle that:

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[1] *WADECO, Inc. v. FCC*, 628 F.2d 122, 133 (D.C. Cir. 1980) (dissenting statement). For whatever little value, this writer has believed for the past 20 years that the most severe penalty of the Communications Act ought be compulsory divestiture. If our regulatory authority is truly premised on the precept that "the airwaves belong to the public," it is sufficient in the case of disqualifying licensee misconduct to compel the wrongdoer to vacate its spectrum slot. Revocation and non-renewal go far beyond that removal remedy, extracting the accrued or enhanced economic value of the licensee's business interest, which has nothing-of course-to do with simply assuring that an untrustworthy licensee does not retain its broadcasting privilege. The economic penalty is purely gratuitous, confiscatory, and generally unconscionable. Were the remedy of compulsory divestiture our most severe penalty, the Commission might not be perceived as straining to avoid the present Act's ultimate sanction, *see, e.g. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 570 (D.C. Cir. 1982) (court "troubled" by dearth of TV licenses lost to challengers), a sanction wholly disproportionate to any FCC offense in the multi-hundred million dollar milieu of today's licenses. No other civil sanction in law approximates the harshness of loss of a station license; nor do most criminal sanctions, in fact, short of rape, homicide, or treason. A violation of 47 CFR § 1.65, however aggravated, should not cost an offender over $400 million. *See RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). But, until our anachronistic law changes, we must apply it neutrally.

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.

Id., at 1210 n. 77 (quoting *FCC* v. *WOKO*, 329 U.S. 223, 227 (1946)).[2]

The Board has employed the lesser sanction of a short-term renewal,[3] and seriously considered that sanction here. However, that sanction is appropriate when the purpose is to test *future* compliance with FCC operating requirements, and is plainly inapposite when dealing with egregious lack of candor in the very prosecution of competing application. For the latter, there is no routine opportunity to "test." Here, we are confronted not with *WOKO's* "immaterial and useless deceptions," but with grave ones going to the core of the licensee's comparative application. In such cases, the *Character Policy Statement* demands the result here obtaining. We have "consider[ed] all the facts of [this] case in . . . the disposition of matters involving misrepresentation or lack of candor," 102 FCC 2d at 1211, yet find little to mitigate this licensee's premeditated pattern of lack of candor.[4] Disqualification must follow. *The Old Time Religion Hour, Inc.*, 95 FCC 2d 713 (Rev. Bd. 1983), *review denied*, FCC 85-104, released March 5, 1985, *recon. dismissal aff'd*, FCC 86-165, released April 15, 1986.

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[2] *But compare id. with Broadcast Associates of Colorado*, FCC 86-215, released May 9, 1986 (citing *Character Policy Statement*, but holding that admitted misrepresentation at hearing and false application certification not disqualifying), *reversing* 100 FCC 2d 616 (Rev. Bd. 1985) (majority opinion). *See also Character Policy Statement*, 102 FCC 2d at 1211, declining to "renounce authority" over "'immaterial' misrepresentation," but indicating intent to "consider all the facts of a case."

[3] *E.g., Gross Telecasting, Inc.*, 92 FCC 2d 204 (Rev. Bd. 1982), *review denied*, FCC 83-443, released November 21, 1983.

[4] To the extent that the licensee asserts improper legal advice, the law provides ample remedies for any professional malfeasance. An applicant must take responsibility for its own affirmative deceit. *WADECO, supra; cf. RKO General, supra*, (licensee found disqualified for station under renewal challenge even absent intent to deceive and reliance on counsel).

FCC 85D-75

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of

MID-OHIO COMMUNICATIONS, INC.

For Renewal of License of Station
WBBY(FM), Westerville, Ohio

For Construction Permit

BC DOCKET
NO. 82-282
File No.
BRH-790601F6

Appearances

Lee W. Shubert, Esq. and *Richard M. Riehl, Esq.* on behalf of Mid-Ohio Communications, Inc. and *Larry A. Miller, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: December 18, 1985; Released: December 23, 1985

Preliminary Statement

1. On June 1, 1979 Mid-Ohio Communications, Inc. (Mid-Ohio) filed an application for the renewal of the license of Radio Station WBBY(FM), Westerville, Ohio. On September 4, 1979 an application for a construction permit for the same facility was filed by Metro Broadcasting, Inc. (Metro). By a *Memorandum Opinion and Order*, released June 1, 1982, 90 FCC 2d 114 (1982), the applications were designated for a comparative hearing.[1] A

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[1] In the order designating the applications for hearing, the Commission also granted its consent to the transfer of control of Mid-Ohio. On March 14, 1980, QNP Corporation (QNP), the transferee had filed an application for transfer of control from William R. Bates, the transferor. Prior to the transfer, Mr. Bates has owned 50.1% of the stock of Mid-Ohio, QNP had owned 25% and Richard Nourse 24.9%. 90 FCC 2d at 115. The grant of the transfer authorized QNP to assume Mr. Bates' stock.

hearing was held from November 16 through 18, 1982, and on September 16, 1983, an Initial Decision (ID) was issued in which the application of Mid-Ohio was denied and that of Metro was granted.

2. Exceptions to the ID were taken by the parties, and on November 2, 1983 Metro filed a motion to reopen the record and to enlarge the issues. Metro's motion requested the enlargement of the issues against Mid-Ohio to examine whether Mid-Ohio had failed to "report the abandonment of a principal's integration proposal . . . and misrepresented . . . the facts of its principal's employment . . . ." Motion at p. 16. Following the usual exchange of pleadings, the Review Board on June 15, 1984 added the following issues with respect to Mid-Ohio and Metro:

> To detemine whether Mid-Ohio Communications, Inc. violated Section 1.65 of the Commission's rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Oho's basic or comparative qualifications.
>
> To determine whether Metro Broadcasting, Inc. failed to submit complete and accurate information regarding its corporate documents, stock ownership and financial qualifications in violation of the Commission's filing, reporting and candor requirements, and the effect thereof on Metro's basic or comparative qualifications.[2]

3. On December 20, 1984 Mid-Ohio and Metro filed a settlement agreement and Joint Request for Approval of Agreement. That agreement was supplemented and amended on June 19, 1985. The settlement agreement, as supplemented, provided for the dismissal of Metro's application in return for a monetary payment by Mid-Ohio. By a *Memorandum Opinion and Order* (FCC 85M-2618) released June 26, 1985, the settlement agreement was approved and Metro's application was dismissed with prejudice, thereby mooting the issue specified against Metro. Metro's burden of proceeding with the introduction of evidence on the remaining issue was assumed by the Mass Media Bureau.

4. Hearing conferences were held on July 25, 1984; September 24, 1984; February 19, 1985; April 23, 1985; and June 14, 1985. Written direct cases were exchanged on June 24, 1985. The hearing convened in Washington, D.C. on July 23, 1985 and continued through July 26. The record was closed on that date. Proposed findings and conclusions were filed on October 3, 1985

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[2] *Mid-Ohio Communications, Inc.*, 56 RR 2d 238 (1984).

and replies thereto were submitted on October 24.

Findings of Fact

Mid-Ohio's Representation Concerning Richard P. Nourse.

5. Richard P. Nourse is Vice President, a director and holder of 24.7% of the stock of Mid-Ohio. In "Answers and Objections to Interrogatories" filed by Mid-Ohio on September 1, 1982 (Answers), Mid-Ohio stated that Richard Nourse was and would be the station manager at WBBY, that he spends forty (40) hours or more per week on station affairs, and that he "assists the General Manager in overseeing the day-to-day operations of . . ." the station. Mid-Ohio stated the Richard Nourse would occupy the position indefinitely from September 1, 1982 and noted that while he had worked at Pioneer Chevrolet in Marietta, Ohio during the summer, he "no longer works at Pioneer Chevrolet." Answers, pp. 7–8.

6. Later, on October 25, 1982, Mid-Ohio supplemented its interrogatory answers (Supplemental Answers) to indicate that the amount of time Richard Nourse had devoted to station affairs had "varied since September 1, 1982." Mid-Ohio also indicated that at the time of the supplement Richard Nourse "devotes 40 hours or more per week" to the station and intended to maintain that time commitment after Mid-Ohio's application was granted. Supplemental Answers, p. 1.

7. The comparative hearing on the applications of Mid-Ohio and Metro was held in Columbus, Ohio on November 16, 17 and 18, 1982. As part of its direct case, Mid-Ohio submitted the written testimony of Richard Nourse which states in pertinent part as follows:

> As Station Manager for the station, Mr. Nourse assists the General Manager in overseeing the day-to-day operations of WBBY(FM). His responsibilities include assisting in the management of the station's business affairs, conducting personnel interviews, doing market research, overseeing EEO compliance, maintaining the station's "payola" file and assisting in the sales area. He is also in charge of public affairs and station maintenance.
>
> Richard P. Nourse devotes 40 hours or more per week to his work for Mid-Ohio and WBBY(FM) and to QNP's investment in Mid-Ohio. He proposes to continue this time commitment to the station.
>
> . . .
>
> During the summer of 1982, Mr. R. Nourse worked as Acting General

> Manager of Pioneer Chevrolet in Marietta, Ohio. In this position, he oversaw the company's budgeting, floor plan controls, advertising campaigns, and business affairs.

Mid-Ohio Hearing Exhibit No. 2, p. 9–10. At the hearing Richard Nourse sponsored his written testimony and swore that the statements contained therein were "true and correct to the best of his knowlege and belief." Tr. 160. There was no cross-examination of Richard Nourse with respect to the content of his written testimony, nor was he questioned concerning the responses to interrogatories.

8. Following the conclusion of the hearing and the closing of the record, Mid-Ohio submitted its proposed Findings of Fact and Conclusions of Law, as well as its Reply to Proposed Findings of Fact and Conclusions of Law. In the latter document, which was tendered to the Commission on January 25, 1983, Mid-Ohio argued that Carl C. Nourse, Mary P. Nourse and Richard P. Nourse "are fulfilling their commitments to the station *at the present time.*" Reply Findings, p. 15; emphasis in original. The arguments were submitted in opposition to accusations by Metro that the integration commitments of the Nourses were not to be relied upon.

9. On September 16, 1983, an Initial Decision adverse to Mid-Ohio was issued; and on October 17, 1983 Mid-Ohio filed its exceptions and supporting brief, stating therein that Richard Nourse was working full-time as station manager. Exeptions, p. 16.[3] Mid-Ohio stated that Richard Nourse "has been assisting the General Manager in all areas of station operation," and that he and his mother, Mary P. Nourse, "have been devoting more than forty hours per week to station affairs." Exceptions, p. 17.

10. Shortly after the filing of the parties' exceptions to the ID, Metro filed its motion to reopen the record and to enlarge issues, alleging that Richard Nourse no longer worked at the station. Mid-Ohio filed its opposition on November 16, 1983 and with it a statement, dated November 14, 1983, from Richard Nourse which indicates that he had been working for Pioneer Chevrolet-Cadillac, Inc., Marietta, Ohio but throughout, with some variations, had continued to "work between 30 and 40 hours per week on matters related to the operation on WBBY(FM). Opposition, Attachment A., p. 3.

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[3] The Initial Decision did not credit the integration of Richard Nourse because he was not an owner at the time of the "B" cut-off. I.D., Conclusions 13–16.

11. Richard Nourse was responsible for preparing the notes for the attorneys in connection with the "Answers and Objections to Interrogatories" which were filed by Mid-Ohio on September 1, 1982. The actual "Answers" were prepared by Mid-Ohio's attorneys. As of September 1, 1982, the date the document was filed, the representations contained in the "Answers" concerning Richard Nourse's time commitments and his involvement with Mid-Ohio, WBBY and QNP were correct. Tr. 1361.

12. Richard does not recall why the October 25 "Supplemental Answers" were filed, though he is sure he was consulted by his attorneys regarding them. He assumes that the language about his time commitment having varied "since September 1, 1982," was a reference to the time he had been spending in Marietta. He reviewed the "Supplementary Answers" prior to the time they were filed and testified that he believed the representations concerning his involvement with WBBY were true and correct as of the date of the date they were filed with the Commission. Mid-Ohio Ex. No. 1-R, pp. 11-12; Tr. 1364.[4]

13. Richard Nourse reviewed his 1982 direct case testimony prior to the time it was submitted to the Commission and stated that he believed it to be true and correct. Tr. 1365. He appeared at the evidentiary hearing in November 1982 to sponsor his written case exhibit. The statements contained in his direct testimony, he believed, were true at the time he took the witness stand. He recalls being coached by the attorneys as to the response he should give if there were questions about his involvement with Pioneer. He remembers being told to state what he was doing at Pioneer, if asked about it. Mid-Ohio Ex. No. 1-R, pp. 11-12. Richard Nourse was not questioned by Metro's attorney, and the Bureau was not represented at the hearing.

14. Richard does not recall, nor is he aware of any reason, why his involvement at Pioneer was not expressly brought before the Commission prior to the time Metro filed its Motion to Enlarge Issues. He does not recall anytime when it was decided that the information concerning his Marietta involvement should not be reported to the Commission. He testified that he and his family were relying upon their attorneys to conduct the case properly, and therefore relied upon the attorneys' judgment in handling the matter. Mid-Ohio Ex. No. 1-R, p. 13.

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[4] The "R" in the above citation and others which follow is used when reference is made to Mid-Ohio's exhibits in the remand proceeding as opposed to those submitted during the original hearing.

15. Relative to Mid-Ohio's "Reply to Proposed Findings and Fact and Conclusions of Law," filed January 25, 1983, Richard Nourse recalls reviewing Mid-Ohio's document before it was filed with the Commission by Mid-Ohio's attorneys, but does not remember making any changes or corrections to the document. He relied upon counsel to prepare such documents and testified that he had no objection to the language describing his involvement with WBBY because he believes he was devoting approximately 40 hours per week to the affairs of the station. Mid-Ohio Ex. No. 1-R, pp. 13-14.

16. The statement made by the attorneys in the Exceptions filed on October 17, 1983 that Richard Nourse was actively assisting the general manager in all areas of station operation and that both Mary and Richard Nourse were devoting more than 40 hours per week to the station's affairs was, according to Richard's testimony, a true statement at the time it was made. The attorneys were aware that Richard Nourse was filling in at Pioneer Chevrolet-Cadillac on a two-to-three-days-per-week basis, and Carl Nourse was advised by attorneys at Hogan & Hartson, which represented Mid-Ohio at the time, that it was not necessary to report Richard Nourse's activities at Pioneer because he was keeping his commitment to the station. Mid-Ohio Ex. No. 2-R, p. 9.

17. As to his statement that was attached to Mid-Ohio's November 1983 opposition to the petition to enlarge issues, Richard Nourse reviewed the statement just before it was filed and testified that it was accurate; that he was committed to spending 40 hours a week on the station's affairs, and that as of November 16, he was working approximately 30 hours a week on the affairs of WBBY. Tr. 1330.

18. An assessment of these claims requires an examination of the evidence regarding Richard Nourse's employment at Pioneer Chevrolet and the extent of his concurrent involvement on the affairs of WBBY. These are described in the succeeding sections of this decision.

Richard Nourse's Involvement with Pioneer Chevrolet-Cadillac

19. Sometime in June 1982, shortly after approval of the transfer of control of Mid-Ohio from William Bates to QNP, Richard Nourse began working at WBBY. QNP is a family company which owns the businesses in which the Nourse family is involved. In June 1982 the businesses included several automobile

dealerships, including Quality Chevrolet in Columbus, Ohio, and Pioneer Chevrolet-Cadillac, Inc., Marietta, Ohio, as well as Windsong Tennis and Country Club, Inc., Worthington, Ohio. Mid-Ohio Ex. No. 1-R, pp. 2-3. QNP is owned by Carl and Mary Nourse, Richard's father and mother.

20. Richard's employment at the station came shortly after Carl Nourse received a letter from Hogan & Hartson advising him of steps to be taken, following the Commission's consent to the transfer of control of Mid-Ohio to QNP, to prepare for the upcoming hearing.[5] One of the recommended actions was to immediately install Richard as the Station Manager of WBBY and to assign him duties relating to programming and the day-to-day operations of the station. Mid-Ohio Ex. No. 2-R, p. 1.

21. At about the same time, however, Carl Nourse decided that Richard was needed to "baby-sit" on a part-time basis, the business of Pioneer Chevrolet-Cadillac in Marietta, Ohio. Although the dealer of record was Paul Aselin, and Carl Nourse was formally only a "financial participant" in the business, Carl Nourse in fact owns and controls Pioneer. Mid-Ohio Ex. No. 1-R, p. 6, Tr. 1157.

22. Richard Nourse was sent to Marietta for several reasons: First Aselin had produced a feature-length motion picture and had reached the point where it was necessary for him to complete the film's editing and dubbing and to find a distributor. In addition he was at the time having domestic problems and desired to spend some additional time with his family. Mid-Ohio Ex. No. 1-R, p. 6, Tr. 1105.

23. Richard Nourse was to oversee the business in Aselin's absence, assisting with relatively routine tasks relating to the business — dealing with banking institutions, signing checks, accounting, etc. Mid-Ohio Ex. No. 1-R, p. 6, Tr. 1105. At the time Pioneer was only marginally profitable; sending Richard Nourse to Marietta was advantageous because it provided his father with management representation with no addition to the dealership's payroll. Mid-Ohio Ex. No. 2-R, p. 2, Tr. 1105.

24. Richard Nourse travelled to Marietta approximately twice a week, typically on Tuesdays and Fridays, to oversee the business. The driving time between Marietta and Westerville is approximately two hours and fifteen minutes. The distance is approximately 120 miles. Richard Nourse would attempt to go to Marietta in the morning and return to the Westerville area that

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[5] The Order approving the transfer also designated WBBY's renewal application for a comparative hearing.

same evening. He worked at Pioneer in this capacity until September 1, 1982, at which time Mr. Aselin returned.

25. In mid-September 1982, Richard Nourse was asked by his father to return to Pioneer so that Aselin could resume efforts to sell his movie. A further problem had also developed at Pioneer because, upon Mr. Aselin's return at the end of August 1982, a conflict developed between him and a key employee resulting in the latter's resignation. Thus, on his return to Pioneer, Richard's duties and responsibilities were expanded to include operations with the service and parts departments and with the body shop. Richard Nourse tried to coordinate those departments and, as he had done before, oversee the financial operations of the dealership. Mid-Ohio Ex. No. 1-R, p. 9. From October 1982 until the end of the year, he continued to spend about two days per week at Pioneer. He had no fixed schedule at Pioneer, his duties consisting essentially of supervising the financial affairs and the operations of departments over which he had authority.

26. In January 1983, Richard Nourse began spending three days per week at the dealership. This included one one-day round-trip between Marietta and Westerville and another trip which involved an overnight stay in Marietta. He maintained the three-days-a-week schedule in Marietta for most of 1983.

27. On October 29, 1983 Richard got married, and at the end of November he ceased commuting to Marietta, moving into a condominium there with his wife.

28. Richard Nourse is, at present, the general manager of Pioneer Chevrolet-Cadillac. He spends 35 to 40 hours per week at Pioneer and does not currently spend much time with WBBY. In a sense, his status is temporary because Carl Nourse could ask him to go back to WBBY at anytime, and because Chevrolet, which reserves the right to have a general manager removed on 48 hours notice, has urged Carl Nourse to have Paul Aselin assume his old position. Tr. 1148, 1257-58.

29. By December 1984, during the course of preparing for the taking of the depositions in connection with this latest phase of WBBY's renewal proceeding, Richard Nourse, according to this testimony, realized that his desire to be the station manager at WBBY had waned and that if the WBBY license was renewed, he did not want to be obligated to occupying this position. Among the factors influencing his change of mind were his marriage in October 1983, and the hiring of Dan Morris as general manager at WBBY in November 1983. Mid-Ohio Ex. No. 1-R, p. 15, Tr. 1259-60. Morris is a veteran broadcaster in whom the owners

have full confidence and once he became familiar with the WBBY operation, Richard and his wife established a residence in Marietta where she is now employed. In addition, improvement in the automobile business had required more involvement by Richard in the affairs of the dealership. In sum, if Carl Nourse asked Richard Nourse to serve as Station Manager of WBBY, Richard would to so, but his interest in broadcasting is less than it was in 1982 when he made his orginal commitment to work at the station.

30. From June 1982 until the end of the year, one-half of Richard Nourse's salary was paid by Windsong, the other half was paid from the operating account at Quality Chevrolet. Mid-Ohio Ex. No. 1-R, p. 9, Tr. 1105. Presently his salary is payed entirely by Pioneer. The changeover occurred in July 1983. At no time has Richard Nourse ever been on the Mid-Ohio payroll. Mid-Ohio Ex. No. 1-R, p. 11, Tr. 1227-28.

Participation by Richard Nourse in the Affairs of WBBY.

31. The record in the original proceeding with regard to Richard Nourse's work at Pioneer Chevrolet states only that he served as acting general manager during the summer of 1982 (Mid-Ohio Ex. No. 2, p. 10).[6] Further, his testimony at the original hearing was that he devoted 40 hours per week to performing various tasks as WBBY and intended to continue doing so. It is Mid-Ohio's position that notwithstanding his activities at Pioneer Chevrolet, Richard Nourse also performed tasks for WBBY during the relevant time period that put him in substantial compliance with his representations at the hearing.

32. There is no documentary evidence either supporting or contradicting this claim.[7] The evidence therefore consists entirely of testimony: Bryan McIntyre, Carl Nourse and Richard Nourse describing Richard's activities on behalf of WBBY and David Freeman maintaining that his alleged functions were minimal or nonexistant. The testimony is frequently less than specific, particularly regarding the time frame and the amount of time that was actually devoted to the tasks being described. The discussion of which follows is organized chronologically to the extent permitted by the state of the record.

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[6] Responses to interrogatories filed September 1, 1982 stated (p. 8) that he "no longer works at Pioneer Chevrolet."

[7] During the fall of 1982 Richard Nourse kept a diary or log describing the tasks he was performing for WBBY. However, the entries were apparently so confusing that the document was not offered as evidence by either Mid-Ohio or the Bureau. Tr. 1233-1236.

33. *June-August 1982*. On June 10, 1982 Bryan McIntyre was hired as a consultant for WBBY by Carl Nourse. Tr. 733, 1245. Initially he worked as a liaison between Carl Nourse and Hogan & Hartson, as well as between Carl Nourse and the WBBY staff. Mid-Ohio Ex. No. 3-R, p. 1, Tr. 1245-46. Carl Nourse was McIntyre's boss and McIntyre answered directly to him. Tr. 745. McIntyre compiled material for the hearing and assisted in the preparation of some documents by providing information to the attorneys. He also reviewed documents which had been prepared by Hogan & Hartson for completeness and accuracy. Tr. 734.

34. McIntyre's office was next door to Carl Nourse's office at Quality Chevrolet, and he saw Carl Nourse daily. McIntyre functioned as the "ears" or the "front man" for the Nourses and regularly reported to Carl Nourse on what was happening at the station. Tr. 745, 746. In addition he began training Richard Nourse to be Station Manager at WBBY, a position in which Richard would be working with the station's Public File, its EEO plan, its sales operations and with its programming. Mid-Ohio Ex. No. 3-R, p. 2; Tr. 742. The title of station manager was assigned to Richard Nourse at the suggestion of Hogan & Hartson. At the time, the person at WBBY with the title of general manager was David R. Freeman, a former sales manager at WBBY. Mid-Ohio Ex. No. 1-R, p. 2, Tr. 1236.

35. As Richard Nourse's mentor, McIntyre worked on a regular basis with him. About three times a week they would meet and go over station affairs. Sometimes McIntyre and Richard Nourse would go to the business offices in Westerville or the studios in Sunbury to review various projects on which they were working. Mid-Ohio Ex. No. 3-R, p. 3.

36. Much of Richard Nourse's initial association with McIntyre consisted of the latter explaining to Richard what McIntyre was doing at the station. To the best of Richard Nourse's recollection, the first task he performed at WBBY in June 1982 was to establish certain personnel procedures and policies. In addition, he was involved with planning for the upgrading of WBBY's equipment and facilities. At the time the Commission approved the transfer of control of QNP, WBBY seemed to be experiencing a regular turnover in sales personnel. Richard Nourse recalled that one of his projects was to try to find the cause for the turnover. He worked on pay programs for sales personnel, trying to make the programs more conducive to keeping sales personnel at the station. He was not involved with making sales calls. Mid-Ohio Ex. No. 1-R, p. 2, Tr. 959-62, 1351-54, 1389-90.

37. Richard also worked with McIntyre on the preparation of an employee manual which attempted to codify such things as paid insurance, vacation and sick leave policy, etc. Mid-Ohio Ex. No. 3–R, p. 4. Another duty assigned to him was the supervision and maintenance of the station's Equal Opportunity Employment Compliance File and the Payola File. Neither of the tasks took much time, because both could be accomplished by organizing the station's files. Thereafter, the files were essentially self-sustaining. Mid-Ohio Ex. No. 1–R, p. 3, Tr. 782, 875, 888–90. Mid-Ohio Ex. No. 2–R, p. 5.

38. Richard Nourse was also responsible for the development of a computer program which interfaced with the operation of the radio station and monitored on a daily basis the status and progress of all the family business. Tr. 2241–43. The computer project began in the early summer of 1982, and Richard Nourse spend many days on the project over a five month period. Tr. 1161. The problem was that the Nourses needed a computer which would handle all of the family's businesses — the radio station, the auto dealerships and the tennis club. No such program was available. Tr. 1394. Richard Nourse worked with Reynolds & Reynolds, a computer company, to develop the program to meet the Nourse's needs. Tr. 1395. He also attempted to develop a computer program which would program WBBY's music, based upon the music card catalogue which had been developed; the program could not be implemented, however, due to hardware limitations which made the software program impractical. Tr. 1397.

39. Once QNP assumed control of WBBY, management meetings were held on a weekly basis. Richard Nourse attended most of the meetings held during the summer of 1982.

40. After beginning as a station manager trainee, Richard Nourse assumed the title and position of Station Manager about August 1982, when press releases were sent out naming him to the position. Mid-Ohio Ex. No. 3–R, p. 2.

41. *September–December 1982.* This period encompasses the time during which the answers to interrogatories were filed, the exhibits exchanged, and the hearing conducted. It is also the period in which Richard Nourse resumed his two day per week visits to Marietta (para. 25 supra).

42. During September 1982 Richard Nourse spent five to seven hours each week working on maintenance at the station. Mid-Ohio Ex. No. 1–R, p. 2 Tr. 1143. When QNP assumed control of Mid-Ohio, the station's physical plant was in poor condition. The

studio was located in Sunbury, Ohio in a corn field. A long gravel driveway leading to the building, was strewn with pot holes. Brush had grown up around the building and the area was littered with trash. With Richard Nourse's participation and supervision, the studio was completely renovated. Mid-Ohio Ex. No. 3–R, p. 4, Tr. 782, 914.

43. Richard Nourse did little or no "on-air" work at WBBY. In September 1982, however, he became involved and worked with Tim Hodges, the station's program director, on concepts for revamping the programming at WBBY. His efforts were focused on developing a format which would provide a suitable transition of musical selections from morning to late evening within the overall jazz format of the station. Mid-Ohio Ex. No. 1–R, p. 3. During September and October he surveyed people concerning their jazz music preferences, and based upon these surveys sought to develop a list of songs which might be the foundation for the station's programming. It was the Nourse family's belief that WBBY should broaden its base of listeners to include more than just jazz enthusiasts. The surveys, therefore, attempted to determine community tastes regarding various forms of jazz, so that programs could be developed that would better reflect those interests. Mid-Ohio Ex. No. 1–R, p. 4, Tr. 941–44, 1341–45, 1459.

44. The format formulated by Richard Nourse called for "cycling" of music — a schedule of mood changes throughout the day-parts. The identification of different, more mass-appeal-type music, led to the cataloging of music at the station. Tr. 947. There were 20,000 albums with eight to ten cuts each to be catalogued, and the process ran for nine or ten months through the fall of 1982 and the spring of 1983. Tr. 863, 946. Richard Nourse personally types the catalogue cards, along with the other Nourse family members. Tr. 770, 944–47, Tr. 1345–47.

45. Mr. McIntyre and Richard Nourse also collaborated on the refunding of money to people who had sought to join what was called the "Jazz Ambassadors Club," a promotional device initiated by Ken Bates, the former General Manager of the station and son of Bill Bates. The idea was to enroll listeners in a "club" which was supposed to provide benefits such as a regular newsletter, discounts at client locations, drawings for concert tickets, and the like, in return for an $18.00 payment. The Nourses decided to refund the money to those listeners who had paid the membership fee, a project which took considerable time. It was during the fall of 1982 that the station actually got the

form letter together and determined to whom the refunds should be sent. Mid-Ohio Ex. No. 3-R, p. 6.

46. Richard was also involved in the hiring of announcers George Cobb and Bob North. Richard Nourse, Bryan McIntyre and Carl Nourse met with Mr. North several times before he was actually hired. Richard Nourse prepared the employment agreement for Mr. North and he was hired as the morning announcer. Mid-Ohio Ex. No. 3-R, p. 6.

47. With the increase in his duties at Pioneer Chevrolet Richard Nourse's attendance at the weekly WBBY management meetings dropped off. During the fall of 1982 he was present at somewhat more than one-half of the meetings. Tr. 965-906; 976.

48. *January 1983 and Thereafter.* By this time the original hearing had been completed and the record closed. Proposed findings were filed in December 1982 and replies in January 1983. In January Richard Nourse began spending three days each week in Marietta. However, he continued to perform various functions for WBBY.

49. Near the beginning of 1983 Richard Nourse was involved with the relocation of WBBY's studios, so the studios would be co-located with the station's business offices. At the time QNP assumed control of the station, WBBY's studios were located at the transmitter in Sunbury, approximately 12 miles from Westerville. Richard and Bryan McIntyre spent a significant amount of time planning the conversion of conventional office space into a broadcast studio. Mid-Ohio Ex. No. 1-R, pp. 4-5, Tr. 775.

50. It became known in December 1982 that the company which had been leasing the front part of the second floor of the building where the sales office was located planned to vacate its space as of March 1, 1983. Richard Nourse worked with McIntyre on plans to utilize this space for a receptionist's area, studio space, a conference room, a music library, etc. Richard personally drew up the plans for allocating space for these activities. He was also responsible for the design of the studio. Tr. 1145. Mid-Ohio Ex. No. 3-R, p. 7. From January 1983 through the time the studios were moved from Sunbury to Westerville, McIntyre saw Richard Nourse almost daily except on the days he was in Marietta. Tr. 979-980.

51. Richard Nourse was also responsible for finding alternate space for the sales offices and studios. This involved resolving a zoning problem, a project which extended over a three month period. He also worked on the project with architects for about

one and a half hours per day for a period of approximately six weeks. Tr. 1162-1164.[8]

52. Richard also spent time with McIntyre in connection with certain engineering matters at the station. These pertained to the selection and ordering of new equipment for the new studios when the studios were moved from Sunbury, and was essentially a learning experience for Richard, involving such things as determining which equipment was superior and which the station could afford. Mid-Ohio Ex. No. 1-R, p. 5. Richard Nourse was involved with the decision-making for the lease of two Ampex reel-to-reel tape machines and a new telephone system for the Westerville office. He also worked with McIntyre in connection with the acquisition of a new transmitter for the station. After they met with equipment sales representatives, McIntyre made the recommendation as to which transmitter to buy and Richard Nourse was involved with the lease aspects of the transaction. Mid-Ohio Ex. No. 3-R, p. 5, Tr. 951-53. Richard negotiated the lease agreement for the equipment which was ultimately acquired for the station. Mid-Ohio Ex. No. 1-R, p. 5.

53. From the time QNP assumed control of WBBY, Richard Nourse was involved in an ongoing search for a manager to replace Mr. Freeman. In early 1983, he participated in extensive negotiations with James Pidcock regarding the position of general manager at WBBY. Mr. Pidcock was then employed by Taft Broadcasting in Tampa, Florida. A great deal of time was spent by Richard trying to familiarize Mr. Pidcock with the station's operation in order to avoid an extensive post-hiring orientation period. Their discussions extended over a six month period but in the end Pidcock was not employed. Mid-Ohio Ex. No. 1-R, p. 4; 2-R, p. 5; 3-R, p. 6.

54. During February and March 1983 Richard Nourse's attendance at management meetings dropped off some. After February or March 1983, he attended approximately one-third to one-fourth of the meetings through June 1983 when his attendance decreased further. Tr. 978.

55. In addition to the foregoing activities, there is testimony more general in nature regarding Richard's concern and involvement with WBBY despite the two or three days per week he spent in Marietta. Richard and Bryan McIntyre had frequent telephone discussions about the affairs of WBBY when Richard Nourse was in Marietta. McIntyre would call Richard Nourse at

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[8] These figures are rough estimates provided by Bryan McIntyre and presumably exclude those days that Richard Nourse was in Marietta.

Pioneer and Richard Nourse would call Mr. McIntyre at Quality Chevrolet. Most of the conversations related to coordinating their activities on station projects in which the two were involved. Mid-Ohio Ex. No. 3-R, p. 8.

56. Richard also usually worked weekends on station affairs. Some work was also done at his parents' house when he would visit them during his days in Columbus and discuss station affairs with his father.[9] From January until the end of October 1983, according to his testimony Richard Nourse spent approximately 36 hours per week at Pioneer. Of that time, it was not unusual that ten to fifteen hours were devoted to the affairs of WBBY. It was typical for Richard Nourse to work 60 hours per week during this period. Mid-Ohio Ex. No. 1-R, pp. 10-11. The station business which Richard Nourse carried on from Marietta involved projects such as the creation of song listings, policy and procedure manuals, etc. Mid-Ohio Ex. No. 1-R, p. 11.

57. *Testimony of David Freeman.* The foregoing findings are based on the testimony of Brian McIntyre, Richard Nourse and Carl Nourse. This evidence was disputed by David Freeman, who was called as a witness by the Mass Media Bureau and who maintained that it considerably exaggerated Richard's participation in station affairs. David Freeman had been hired in 1978 as a sales manager for WBBY. When QNP (the Nourses) acquired control in June 1982 Freeman was named general manager of the station. He remained at WBBY until November 1983.

58. Freeman's testimony can be summarized as follows: He stated that to his knowledge Richard was not involved in personnel decisions (Tr. 623) and had no knowledge that Richard ever interviewed any sales applicants. He did recall that Richard once suggested that a larger sales staff be hired. Tr. 624, 651. During the period that Freeman was at WBBY, he saw Richard at the station fewer than half a dozen times. Tr. 625. Freeman never saw Richard at the Sunbury studios but did see him several times at Quality Chevrolet. Tr. 626. Freeman only recalled seeing Richard at two management meetings after June 1982. Tr. 628. Freeman was not aware of any market research that Richard had done (Tr. 641) and considered Bryan McIntyre to be generally responsible for the EEO file and Payola file. Tr. 642-3. To Freeman's knowledge, Richard was not responsible for station maintenance although he was told by Carl that "the boys" cleaned up the Sunbury studio. Tr. 647-8. The concept of

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[9] As discussed *infra*, Carl Nourse as Mid-Ohio's president was closely involved in station affairs and was for a substantial period the *de facto* general manager.

different music by different day parts evolved over a period of time with Hodges and McIntyre having the most input. Tr. 657–8. Although Richard did suggest some songs and albums, his suggestions were not implemented. Tr. 660. The station's logo was changed to "The Entertainment Alternative" based on suggestions made by Richard, although he did not suggest that particular logo. Tr. 666–8. To Freeman's knowledge, Richard was not involved in the selection of equipment. Tr. 661–3.

59. Though the presiding officer does not doubt Freeman's essential veracity, greater weight has been given to the testimony of Bryan McIntyre as to Richard Nourse's participation in station affairs.[10] First of all McIntyre had been specifically assigned the task of working with Richard and familiarizing him with the operation of a broadcast station. Secondly, until some time in 1983 the geographic configuration of the WBBY operation was such that it would be difficult for Freeman to account for many of the activities attributed to Richard with any degree of certainty. The business office was located in Westerville, the studio and transmitter were about 12 miles away in Sunbury, and other offices were maintained at Quality Chevrolet for Carl Nourse and McIntyre. In addition, throughout the period of time in question Richard had an office at the Windsong Tennis and Country Club, a family owned enterprise he had managed until 1982. Freeman's day-to-day activities, on the other hand, were centered largely at the business offices in Westerville since his primary activity involved sales. Tr. 616–617, 745, 1405. Thirdly, as described below, Freeman's position at the station was always tenuous, and there is little reason to believe that he would be fully informed regarding Richard's activities.

60. When the Commission granted the transfer of control of Mid-Ohio to QNP, the Nourse family felt compelled to replace the then general manager, Ken Bates. Ken was the son of Bill Bates, from whom control of Mid-Ohio had been wrested as the result of a legal battle between the elder Bates and QNP. Freeman had been the sales manager for WBBY, and due to his experience at the station and first-hand working knowledge of WBBY's sales operation, it was decided to name him general manager so as to provide a smooth transition in the management of the station. From the outset, however, the Nourses regarded this as an interim arrangement. Mid-Ohio Ex. 2–R, p. 7. Although holding the title of general manager, he was viewed as being primarily

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[10] Like Freeman, McIntyre is no longer an employee of WBBY. He is presently the Program-Operation's Manager at WPTF Raleigh, North Carolina.

responsible for sales (Tr. 168) and the search for a new general manager commenced almost immediately after the transfer of control took place. Mid-Ohio Ex. No. 1-R, pp 16-17; Tr. 749-52. Consequently, Richard Nourse felt no obligation to report to Freeman and regarded Bryan McIntyre as the staff member with whom he should develop a working relationship. During this period Richard recognized his father as the de facto manager of WBBY, as did Bryan McIntyre and Carl Nourse himself (Tr. 1127, 1129).

61. For all of the foregoing reasons, the presiding officer regards McIntyre as being more knowledgeable regarding Richard's activities and his testimony, therefore, more reliable than Freeman's.

Conclusions of Law

62. The sole issue to be resolved is the one added by the Review Board against Mid-Ohio:

> 2(a) To determine whether Mid-Ohio Communications, Inc. violated Section 1.65 of the Commission's rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Ohio's basic or comparative qualification.

The issue has two aspects: (1) whether Mid-Ohio violated Section 1.65 of the Commission's Rules by failing to report the changed employment status of Richard Nourse; and (2) whether Mid-Ohio or Richard Nourse misrepresented facts regarding Richard Nourse's employment plans during the hearing.

Section 1.65 Issue

63. Section 1.65 of the Commission's Rules requires applicants for Commission authorizations to report substantial changes in matters of decisional significance.[11] The function of the Rule is to

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[11] Specifically, the Rule states:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause

ensure that the information reported in applications remains substantially accurate and complete in all significant respects, *Reporting of Changed Circumstances*, 3 RR 2d 1623 (1964), and to ensure that fair administrative practice is observed in comparative hearing proceedings. *See Allied Broadcasting Co.* v. *FCC*, 435 F.2d 68 (D.C. Cir. 1970).

64. The rule is intended to apply (i) "where there has been a substantial change and (ii) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest" *Reporting of Changed Circumstances, supra* at 1624. More specifically, applicants are obliged to report "any substantial change in circumstances pertaining to . . . factors urged as a basis for a grant or a comparative preference." Id. Excluding from the scope of the rule "minor changes which would have no significance" and even "some material matters [which] normally fluctuate on a day-by-day basis," the Commission characterized the intent of the rule as requiring disclosure of changed circumstances "which *may* make a difference from the standpoint of the public interest, and those *which the Commission should be aware of in order to reach a realistic decision*." 3 RR 2d at 1625 (emphasis added)

65. In this case Mid-Ohio argued that its integration of ownership with management was a highly significant factor favoring a grant of its application. Moreover, it stressed that, unlike Metro, its integration was not merely a proposal but something already in existence, since Carl, Mary and Richard Nourse were already performing the functions described in their direct case exhibit (Mid-Ohio Ex. 2), thus enhancing the credibility of their proposal. However, Mid-Ohio did not report the undisputed fact that from September 1982 onward Richard Nourse was spending two, and later three, days per week managing Pioneer Chevrolet in Marietta, Ohio, some 120 miles from Westerville. It was not until November 1983 when it filed its opposition to Metro's petition to enlarge issues raising the matter that Mid-Ohio disclosed Richard Nourse's employment at Pioneer Chevrolet.

66. Essentially, Mid-Ohio defends its conduct on the ground that Richard Nourse continued to devote 40 hours per week to the affairs of WBBY, so that his employment at Pioneer Chevrolet was not a substantial change of material significance to which

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is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47.

Section 1.65 applies. This position must be rejected.

67. In the first place, the Rule specifically provides that applicants are "responsible for the continuing accuracy and completeness of information furnished . . . in Commission proceedings involving a pending application." In answers to interrogatories filed on September 1, 1982 Mid-Ohio represented that Richard Nourse "no longer works at Pioneer Chevrolet." This statement was accurate at the time it was made; but later that month he resumed his part time employment at Pioneer Chevrolet, and even now continues to work there. Mid-Ohio's obligation to correct the record in this respect seems obvious.

68. Moreover, Richard Nourse's changed circumstance was a critical factor in weighing his integration proposal. Where a representation is made that a principal will be integrated on a 40 hour per week basis, other demands on his time are always relevant in determining the credibility of the proposal, particularly where they regularly involve travel outside the immediate area of the station. *Metro Broadcasting, Inc.*, 97 FCC 2d 688, 701 (Rev. Bd. 1984) (fulltime integration credit not given where principal, a member of state legislative, spent two months per year at state capital); *Berryville Broadcasting Co.* 70 FCC 2d 1, 11–12 (Rev. Bd. 1978) (integration disallowed where principal resides and manages a station in a community located three hours round trip drive from community of license). Here Richard Nourse's weekly two to three day visits to a city some 120 miles from Westerville were clearly a factor to be considered in assessing the likelihood that his integration proposal could be implemented. The letter and spirit of Section 1.65 do not permit an applicant to determine unilaterally that such a matter is of no consequence and thereby remain silent. The rule requires disclosure of information that *may* make a difference and that the Commission ought to be aware of. It is for the Commission, not the applicant, to decide its ultimate importance to the case and to do so on the basis of a full record, including, if requested, cross examination by the competing applicant.[12]

69. The presiding officer therefore concludes that Richard Nourse's changed employment status was a matter of decisional significance since it was material to the ownership integration

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[12] At the original comparative hearing Metro did not cross-examine Richard Nourse. It seems doubtful that this would have been the case had his renewed association with Pioneer Chevrolet been made known.

claimed by Mid-Ohio; and that the failure to report it constituted a violation of Section 1.65.

Misrepresentation

70. This aspect of the issue specified by the Review Board seeks to determine whether Richard Nourse "during the hearing misrepresented the facts regarding his employment plans . . . ." Richard Nourse's testimony at the hearing consisted essentially of a confirmation that the statements about him in Mid-Ohio exhibit 2 (pp. 9–11) were true and correct.[13] The statement that he assists the general manager is somewhat misleading since David Freeman was nominally the general manager. However, the record demonstrates that except for sales, his authority and activities were circumscribed and that irrespective of job titles Carl Nourse was managing the overall operation of WBBY. With this clarification the statement is not inaccurate.

71. The most controversial statement in the exhibit is the representation that Richard Nourse "devotes 40 hours or more per week to his work for Mid-Ohio . . . ." On the basis of evidence taken nearly three years after the fact it is difficult to determine with precision whether this statement was literally true at the time it was made. It is undisputed that Richard was spending two days a week at Pioneer Chevrolet in Marietta during the period in question (November 1982). The findings show, however, that after QNP assumed control WBBY, Richard Nourse was involved in a variety of station related activities and that these activities were ongoing at the time he testified and continued thereafter. On balance the presiding officer concludes that there is substantial evidence to support the conclusion that Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station affairs.[14]

72. This is not to say that all of the endeavors recited in the findings would be cognizable for integration purposes. Some of his tasks, studio maintenance work for example, were not managerial in nature. Others, in particular telephone conversations from Marietta and discussions in the evening with his father about station affairs, do not involve the active day-to-day participation

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[13] Those portions of the exhibit which are relevant to the issue are set forth at para. 7 of the Findings of Fact.

[14] His participation waned during 1983 and by the time Metro's petition to reopen the record had been filed it had declined, by Mid-Ohio's own admission, to a minimum of 30 hours per week.

in station operation that is required for full-time integration credit. This matter is now moot, however, since the case is no longer a comparative proceeding. The issue is one of misrepresentation, and it is evident from the record that the integration claimed for Richard Nourse was not fabricated by the applicant.

73. The real problem with Richard's testimony lies not in what he said but in what he didn't say. For the reasons already set forth with regard to the Section 1.65 issue, a candid description of Mid-Ohio's integration should have included mention of Richard Nourse's employment at Pioneer Chevrolet. It should be noted again that this case differs from the usual comparative proceeding in that Mid-Ohio's integration was not put forward as being prospective; rather it was touted as being already in place and thus more credible. Mid-Ohio had already represented in response to discovery that Richard Nourse's employment at Pioneer Chevrolet had ended by September 1982. In view of its failure to submit a written report of this change, it was surely incumbent on Mid-Ohio to include the matter as part of Richard Nourse's direct testimony. This would have corrected the record with regard to his status and would, presumably, have led to cross-examination and the development of a more complete record on the point.

74. Mid-Ohio's silence on the mattter cannot be attributed to inadvertance since Nourse testified that his counsel was concerned about his reemployment at Pioneer Chevrolet. In fact, it is evident that a judgment was made not to volunteer the information but to respond truthfully in the event the matter arose. Para. 12, supra. In the circumstances, however, shifting the burden for revealing the matter to the competing applicant was plainly improper since Mid-Ohio had already informed Metro through discovery that Richard Nourse no longer worked at Pioneer Chevrolet. Thus, while it has been concluded that representations made during the hearing regarding Richard's employment at WBBY were not, strictly speaking, untrue, it must also be concluded that his failure to disclose his simultaneous employment at Pioneer Chevrolet was misleading and lacking in candor.

Ultimate Conclusion

75. The Section 1.65 issue and the misrepresentation question stem from the same cause: the applicant's failure to disclose that Richard Nourse was working part-time in Marietta while claiming to devote 40 hours per week to the affairs of WBBY. Though not necessarily negating Richard's integration credit, the time spent

in Marietta was an awkward fact that might well have put his claim in doubt. Instead of the full disclosure which the Commission expects,[15] Mid-Ohio opted to finesse the matter, remaining silent and rationalizing its reticence with the ipse dixit assertion that his additional employment was not relevant because, he was still fulfilling his commitment to WBBY. This was a serious error in judgment and one which does violence to the processes of the Commission. Plainly, the only proper course was disclose of the changed circumstance so that its effect could be tested at the hearing.

76. If this were still a comparative proceeding the record developed in this phase of the case would be sufficient to warrant a substantial comparative demerit. *Bay Television, Inc.*, 85 FCC 2d 181, 185 (Rev. Bd. 1983). Even in a non-comparative context, there is some question whether renewal of WBBY's license should be granted. On balance, however, the presiding officer has concluded that denial of the application would be an action more severe than is warranted. Despite its several facets, the conduct in question amounted to what was in fact a single transgression: failure to disclose a material fact involving one aspect of its integration proposal. It was, moreover, mitigated by the fact that Richard Nourse continued to work at the station and for most of the relevant time period was in reasonable compliance with the commitment made in Mid-Ohio's direct case exhibit regarding ownership integration. Thus, notwithstanding Mid-Ohio's failure to meet Commission standards regarding openness and fair dealing in the prosecution of its application, it is concluded that denial of the application for renewal of license is a more drastic action than the licensee's conduct warrants. Since there is no provision for consideration of a forfeiture, the censure expressed in the preceding paragraphs must suffice.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Mid-Ohio Communications, Inc. IS GRANTED.[16]

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[15] *Grenco, Inc.*, 39 FCC 2d 732, 736 (1973) (Commission must be able to rely on candor and honest dealing from its licensees). See also cases cited therein.

[16] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

Tariff

Memorandum Opinion and Order adopted denying Petition for Reconsideration filed by BellSouth Corporation regarding the *Alternative Tariff Order, 50 FR 13028*, April 2, 1985, which adopted guidelines for the implementation of optional alternative tariffs and experimental tariffs. Petition sought modification of certain procedures in that order for review of alternative tariffs.

—MTS/WAT Market Structure

CC Docket No. 78-72

FCC 86-261

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

MTS and WATS Market Structure	CC Docket No. 78-72
Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board	CC Docket No. 80-286

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1986; Released: May 30, 1986

BY THE COMMISSION:

I. Introduction

1. BellSouth Corporation (BellSouth) has filed a Petition for Reconsideration of our *Alternative Tariff Order*,[1] which adopted guidelines for the implementation of optional alternative tariffs and experimental tariffs.[2] In its petition, BellSouth seeks modifi-

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[1] Memorandum Opinion and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 13028 (April 2, 1985) (hereinafter *Alternative Tariff Order*).

[2] Optional alternative and experimental tariffs are "those that involve additional flat rate recovery of non-traffic sensitive (NTS) costs from subscribers, require

cation of certain procedures established in that order for review of optional alternative tariffs. In this *Memorandum Opinion and Order*, we deny BellSouth's petition.

A. Background

2. On November 15, 1984, the Joint Board adopted its *Recommended Decision and Order*[3] on the various issues referred to it by the Commission in April of that year.[4] Chief among these issues were questions regarding recovery of the interstate allocation of non-traffic sensitive (NTS) local exchange costs, specifically, the implementation of subscriber line charges for residential and single-line business customers.[5] The Joint Board recommended that the Commission implement limited subscriber line charges for these subscribers phased in over two years followed by an examination of the impact of those charges. The Commis-

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modification of the NTS pooling requirements contained in Part 69 of the Commission's rules, or require changes in jurisdictional separations." Memorandum Opinion and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-56 para. 14 n.30 (released January 30, 1986). Optional alternative tariffs allow local exchange telephone companies (LECs) to modify their method of collecting the carrier common line revenue requirement through such means as volume discounts funded by a uniform flat surcharge on all customers in the affected study area. Experimental tariffs allow LECs to modify their method of collecting their entire interstate NTS costs through such means as separations changes to allow unified interstate and intrastate access charge plans. Memorandum Opinion and Order, Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, FCC 86-145 at para. 6 n. 22 (released April 28, 1986). In response to recent petitions for waiver of Part 69 of the Commission's Rules filed by a number of Bell Operating Companies, the Commission recently set forth guidelines for a third method of interstate cost recovery plans do not include the elements identified above that characterize optional alternative and experimental tariffs. *Id.* at para. 53. This Reconsideration Order concerns only optional alternative tariffs.

[3] See Recommended Decision and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984).

[4] In the Notice, the Commission requested comments from all interested parties and the recommendation of the Joint Board on: (1) the end user charge for residential and single line business subscribers; (2) the transition mechanism for implementing end user charges for these subscribers; (3) a lifeline exemption or other assistance for low income subscribers; and (4) additional assistance for small telephone companies. See Further Notice of Proposed Rulemaking, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 18318 (April 30, 1984).

[5] Although the Commission requested comments specifically on the use of subscriber line charges, it stated that it would not preclude consideration of alternative plans which would significantly decrease toll loading and achieve the Commission's four basic goals in providing for the recovery of interstate NTS local exchange costs. *Id.* at para. 4.

sion subsequently adopted the Joint Board's recommendations with minor changes and clarifications.[6] Pursuant to the Commission order, a $1.00 monthly subscriber line charge for these customers was implemented on June 1, 1985, and will be increased to $2.00 per month on June 1, 1986.

3. In its order recommending subscriber line charges, the Joint Board also recommended that local exchange telephone companies (LECs) be given flexibility to implement optional alternative interstate tariff provisions for the recovery of carrier common line costs in order to combat localized problems of bypass of the public switched network. The Joint Board noted that authorizing local companies to file optional alternative tariffs for recovery of interstate carrier common line costs will contribute substantially toward reducing localized bypass problems, which the across-the-board reduction in the carrier common line charge due to the implementation of the subscriber line charge cannot completely solve.[7] The Joint Board also recommended a number of guidelines concernning the procedural and substantive aspects of these types of tariffs. It proposed that alternative tariff filings be allowed pursuant to Part 69 of the Commission's rules only when the local exchange company concludes that such tariff changes are desirable and the state regulatory commission concurs in that decision. The Joint Board also recommended, however, that the local companies be allowed to ask the Joint Board to override a state commission's objection or to act on such proposals, if the state commission does not do so within 60 days of the filing. Once state commission or Joint Board concurrence is obtained, the actual tariff would be filed with the Commission on 90 days' public notice and reviewed pursuant to normal Commission tariff reveiw procedures.[8]

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[6] Decision and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (January 8, 1985).

[7] Recommended Decision and Order, *supra* note 2, at para. 26.

[8] The Joint Board envisioned that the tariff proposals would .reflect volume discount rates for interstate access and be designed to encourage use of the local switched network by the interexchange carriers and large volume users. The Joint Board further recommended that any revenue shortfall due to the implementation of these volume discounts be recouped through a uniform surcharge on subscriber line charges for all customers in the study area involved. In addition, the Joint Board limited the subscriber line surcharge for all customers in the relevant study area to a maximum of $.35 per month. It noted that, although this approach would increase slightly the cost burdens borne by these customers, it was unlikely that an alternative tariff would receive state commission or Joint Board concurrence unless all subscribers would, in the long run, benefit from measures encouraging use of the switched

4. The Joint Board recognized, however, that there were a number of questions concerning the implementation of such tariffs that should be examined further. Subsequently, the Chief, Common Carrier Bureau released an *Order Inviting Comments*[9] regarding these implementation issues. On February 26, 1985, we adopted the *Alternative Tariff Order*, which among other things, established procedural and substantive guidelines for the implementation of the optional alternative tariff provisions for the recovery of carrier common line costs.[10]

5. The procedural guidelines for alternative tariffs established in the *Alternative Tariff Order* are: (1) the alternative tariffs are to be filed as part of the local exchange carrier's basic access charge tariff; (2) state or Joint Board concurrence is to be obtained before the actual tariff filing is made with the FCC; (3) an alternative tariff filing can be made with the Commission at any time during the access charge year; (4) Part 61.38 data is to be filed with the alternative tariff provisions along with a letter from the state commission or the Joint Board certifying their concurrence; (5) information is to be filed with the tariff showing that it is properly targeted to prevent bypass of the local exchange by reducing the level of non-traffic sensitive cost recovery from users with a high volume of interstate toll traffic over their switched access lines; (6) the submission to the state commission is to contain proposed tariff pages and all of the support data required for the filing with the Commission, although the state or Joint Board may request additional information; and (7) the state or Joint Board will be notified of any changes in an alternative tariff filing required by the Commission and allowed to withdraw its concurrence. The order also provided that the state commissions must concur or object within 60 days after an alternative tariff proposal is filed. We have also adopted procedural guidelines for Joint Board review of experimental tariffs for the recovery of the interstate allocation of NTS costs, stating that Joint Board review of the tariff should be completed within 5 months of the submission of the proposal.[11]

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local network by the interexchange carriers and high volume users. See Recommended Decision and Order, *supra* note 3, at paras. 39–40.

[9] Order Inviting Comments, CC Docket Nos. 78–72 and 80–286, 49 Fed. Reg. 50410 (December 28, 1984).

[10] We also adopted certain substantive requirements concerning the volume discount mechanism in alternative tariffs to assure that any such plans would be effective in combatting localized bypass and would not impede interexchange competition. *Alternative Tariff Order, supra*, note 1, at para. 3.

[11] We stated the Joint Board may extend the period for its review of experimental tariff proposals by one month when necessary.

B. Pleadings of the Parties

6. In its Petition for Reconsideration and reply comments, BellSouth states that the procedural schedule we established for review of the alternative tariff proposals is unnecessarily long and will impede the timely implementation of such tariffs. BellSouth argues that the entire review process will take 10 months to complete in those cases in which the state objects or fails to act within the 60 day time frame and the Joint Board reviews the proposal.[12] BellSouth argues that there would also be added delays if the alternative tariffs were modified during the review process. In this regard, it notes that modifications made to the tariffs after they become effective would presumably be subject to the same review process.

7. BellSouth states that the regulatory lag associated with such a review process would significantly undermine the effectiveness of the alternative tariffs in deterring bypass, and urges us to adopt shorter review periods. BellSouth suggests that we adopt the review periods proposed in its comments in response to the *Order Inviting Comments*, to reduce the time for state commissions' review to 30 days and establish a 30 day period for any Joint Board review of these alternative tariffs. In support of the shorter review process, BellSouth notes that the state commission and Joint Board review is only preliminary to the Commission's tariff filing and review procedures, which provide adequate opportunity for review prior to implementation.

8. The Ad Hoc Telecommunications Users Committee (Ad Hoc) filed an opposition to BellSouth's petition on June 20, 1985. Ad Hoc contends that, since BellSouth raised this issue in its comments in the underlying proceeding on the appropriate guidelines for the alternative tariff provisions, we have given full consideration to the proposal and rejected it. Therefore, Ad Hoc concludes that the petition should be dismissed. In addition, Ad Hoc argues that the public interest considerations involved in the review of these tariffs require that the state commissions and the Joint Board have adequate time for review, and that a 30 day maximum period for review is not sufficient time to allow for

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[12] BellSouth states that although we did not specify the time frame for Joint Board review of alternative tariff proposals, it is BellSouth's understanding that the Joint Board intends to act on these proposals within five months as it will in reviewing any experimental tariff proposals. Thus, combining state commission and Joint Board schedules with a 90 day FCC tariff review process, BellSouth identifies a 10 month review process.

meaningful review of these tariff provisions. Thus, Ad Hoc urges us to deny BellSouth's petition.

II. Discussion

9. In the *Alternative Tariff Order*, we adopted the Joint Board's provisions for state approval because we recognized the importance of state commission involvement in the development and review of these optional alternative tariffs. Although these tariffs will allow for optional alternative plans to recover some of the interstate portion of the NTS costs, they will be developed and designed for specific study areas and, due to the introduction of a small subscriber line surcharge, would increase slightly the subscriber line charge paid by all customers in the study area involved. Since these tariffs are intended to be solutions to localized bypass problems, state review and concurrence in tariff filings based on local conditions is essential to assure that they are properly targeted. Therefore in the *Alternative Tariff Order*, we required the local exchange companies to submit information required under Part 61.38 of our rules[13] to the state commissions or the Joint Board. In addition, we provided for notification to the state commissions or Joint Board of any subsequent changes in the tariff filing, once either party had approved it, to allow the state commissions or Joint Board the option to withdraw their concurrence. We also noted that the state commissions or the Joint Board could request any additional information they might deem necessary for comprehensive review of these tariffs. Finally, although we established provisions for the Joint Board to overrule a state commission's objection pursuant to the Joint Board's recommendations, we stated that the state commission's grounds for objecting to an alternative tariff should be given considerable weight.

10. In light of the important role of state commissions, we believe it is necessary to afford the state commissions sufficient time for complete review of these proposals. We find that 60 days should provide adequate time for thorough review. We must balance the desire for timely development of alternative tariffs to combat bypass with the need for comprehensive review to ensure that the tariffs will be effective in addressing localized bypass, will efficiently recover the NTS costs, and will not impede fair competition in interexchange telecommunications services. We believe 30 days would not provide the state commissions adequate

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[13] 47 C.F.R. § 61.38 (1985).

time to review the tariff proposals.

11. In addition, we do not see the need to establish a specific time frame for Joint Board review of these tariffs in the event a state commission objects to an optional alternative taiff proposal. We believe that an open time frame is necessary to allow the Joint Board the flexibility to study properly the proposals and the state commissions' objections, to work with state commissions and local telephone companies, and, if feasible, to develop a proposal acceptable to all.

III. Ordering Clauses

12. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by BellSouth Corporation IS DENIED.[14]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[14] This action is taken pursuant to Sections 1, 4(i) and (j), 5, 201-205, 218, and 403 of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 154(i) & (j), 155, 201-205, 218, and 403 (1985). The provisions of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, are not applicable to this proceeding. See 5 U.S.C. § 601. This Commission has found that neither local exchange carriers nor AT&T come within the Regulatory Flexibility Act's definition of a small entity. We do not anticipate that these rules will have a significant indirect effect on entities other than AT&T and the local exchange carriers. Moreover, the indirect effect of federal regulations on parties not directly subject to the rules involved need not be considered pursuant to the Regulatory Flexibility Act.

Lottery
Multipoint Distribution Service (MDS)
Procedures

Order adopted amending a procedural rule set forth in the *Second Report and Order, 50 FR 5983,* February 13, 1985, concerning frequency allocation to various services. Action was taken to provide the Commission with sufficient time to attend to the administrative details required to include settlement entities in the lottery system.
—Multipoint Distribution Service
Gen Docket No. 80-112

FCC 86-225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In The Matter of

Amendment of Procedural Rule Contained in Second Report and Order, Gen. Docket No. 80-112, Adopted: November 21, 1984 Released: February 1, 1985.

GEN Docket No. 80-112

ORDER

Adopted April 30, 1986; Relased May 8, 1986

BY THE COMMISSION:

1. This *Order* amends a procedural rule[1] set forth in the *Second Report and Order*, at para. 31, in General Docket No. 80-112.[2] The pertinent language in the *Second Report and Order, supra,* at

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[1] Change by the Federal Communications Commission in regulations *relating to a cutoff date is a procedural matter and exempt from formal rulemaking procedure under* 5 U.S.C. § 553. Emphasis Added. *See* Ranger v. Federal Communications Commission, 294 F.2d 240 (D.C. Cir. 1961). *See also* Kessler v. Federal Communications Commission, 326 F.2d 673 (D.C. Cir. 1963).

[2] Second Report and Order, Gen. Docket No. 80-112, Adopted: November 21, 1984; Released: February 1, 1985.

para. 31, affected by this *Order* is provided below:

> Applicants who wish to settle will be required to notify us at least two [2] business days before the date of the lottery.

This rule is amended to require applicants intending to form a settlement group to notify the Commission as soon as possible but no later than ten (10) business days prior to the lottery.

2. Experience gained in the administration of the lottery to date reveals that two days is insufficient time to complete the many administrative steps required to include settlement entities in the lottery system. The foregoing amendment is needed to provde the Commission with sufficient time to attend to such administrative details.

3. This *Order* become effective upon publication.[3]

4. Authority for this Order is contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i).

5. ACCORDINGLY, IT IS ORDERED that the rule set forth at para. 31 of the *Second Report and Order*, *supra*, be amended as specified at para. 1 *supra*.[4]

FEDERAL COMMUNCATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A.

Amendment to Para. 31, Second Report and Order, Gen. Docket No. 80-112

1. Para. 31, *Second Report and Order, supra*, is amended to read as follows:

31. Other than the timing of petitions to deny and the application of preferences to be discussed below, the lottery procedures to be used for MMDS generally follow the procedures set forth in the Lottery Order, 93 FCC 2d at 996. However, in order to clarify the application processing scheme and to set forth the changes adopted for MMDS, we will review the procedures here.[34] First, applications that

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[3] Notice of the amendment of the procedural rule set forth in the *Second Report and Order*, at para 31, in General Docket No. 80-112, as promulgated by this *Order*, has appeared in the Notices specified in F.N. 4. Moreover, the Administrative Procedures Act, APA, does not require that a procedural rule be published at least thirty (30) days prior to its effective date; such requirement is only imposed on substantive rules. See 5 U.S.C. § 553(d). See also F.N. 1.

[4] This Order does not rescind or stay the notice given in the Federal Communications Commission's *Notice* of September 24, 1985, *Multichannel Multipoint Distribution Service Applications Accepted for Filing and Notification of Lottery Date*, Report No.: MMDSL-3, or the *Notice* of October 25, 1985, Report No.: MMDSL-4.

[34] Our present intention is to process mutually exclusive applications according to the number of applications filed in a particular market. The markets having the

are not mutually exclusive will be processed and acted upon. Then, applications that are found to be mutually exclusive will be pre-screened for their acceptability for inclusion in a lottery. If found acceptable, these applications will be placed on public notice and the public will be given 30 days to inspect the applications. The public notice will also announce the date and time of the lottery for applications in these markets. Applicants intending to form a settlement group should notify the Commission as soon as possible but *no later than ten (10) business days prior to the lottery.*[35] Applicants who wish to claim a preference must do so in writing for each application within 30 days of publication of this Order in the Federal Register. Because of the large number of MMDS applications, we will strictly enforce the 30-day requirement. This lottery will be held under the direction of the Office of the Managing Director. For each channel group in each market, the random selection will choose a tentative selectee. After the lottery is conducted, we will issue a public notice announcing the tentative selectees. Parties will have 30 days from the date of the public notice announcing the tentative selectees as that date is defined in § 1.4 of the rules to file petitions to deny against the tentative selectees only. The tentative selectees will have fifteen days to file their consolidated replies.[36] We will then reivew the petitions filed against the selectees. If we find that the tentative selectees are qualified, we will grant their applications. If, however, a substantial and material question of fact is raised, the application will be designated for hearing in accordance with § 1.823 of the rules. If any selectee is found unqualified, we will repeat the above procedures until we grant one of the applicants an authorization for that market.

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greatest number of applications will be processed first and subsequent markets taken in order of diminishing number. We do not intend to draw a series of service areas first, taking cooperation between applicants and natural barriers into account. This procedure, as suggested by one commenter, would not expedite service to the public and would be very time consuming for the Commission's staff.

[35] Settlements are discussed in paragraphs 38–39, infra.

[36] Any amendments required by § 1.65 of the rules must be filed by the tentative selectees within 14 days from the date of public notice announcing their selection. See 47 CFR § 1.4. This will give prospective petitioners notice of any significant changes prior to the filing of petitions to deny.

Radiodetermination Service

Petitions for reconsideration and petition for clarification of *Report and Order, 50 FR 39101*, that allocated radio frequency bands for new radiodetermination satellite service (RDSS) granted to an extent. Commission clarifies that it did not intend to imply that an enhanced Global Positioning System (GPS) could not provide the same degree of accuracy as RDSS.

—Radiodetermination Satellite Service
Gen Docket No. 84-689

FCC 86-163

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules to Allocate Spectrum for, and to Establish other Rules and Policies Pertaining to, a Radiodetermination Satellite Service	Gen. Docket No. 84-689 RM-4426
In the Matter of	
Policies and Procedures for the Licensing of Space and Earth Stations in the Radiodetermination Satellite Service	Gen. Docket No. 84-690
In the Matter of the Application of	
GEOSTAR CORPORATION	File No. 2191-DSS-P/L-83 File No. 2192-DSS-P/L-83 File No. 2193-DSS-P/L-83 File No. 2194-DSS-P/L-83

For Authority to Construct, Launch and
Operate Space Stations in the
Radiodetermination Satellite Service

A request to allocate the 1606.8–1613.8
MHz band on a Primary Basis to the
Radio Astronomy Service
RM-4839

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1986; Released: April 28, 1986

BY THE COMMISSION:

1. The Commission has before it three petitions for reconsideration and one petition for limited clarification of its *Report and Order* in the above-captioned proceeding that allocated radio frequency bands for a new radiodetermination satellite service (RDSS).

BACKGROUND

2. This proceeding was initiated in response to a petition for rulemaking filed by Geostar Corporation seeking to establish a radiodetermination satellite service (RDSS). This new service, through the use of low-cost hand or mobile units, would provide a broad segment of the public accurate information concerning their geographical location and velocity, short messages, and a variety of similar innovative services. Such services have many potential uses, and there has been substantial interest in their early implementation.

3. On July 12, 1984, the Commission adopted a *Notice or Proposed Rule Making (Notice)*, that dealt comprehensively with the initiation of this new service.[1] The *Notice* discussed potential frequency allocations, entry policies and procedures for filing applications. In addition, the *Notice* addressed the extent of necessary regulation for RDSS licensees. Subsequently, in addition to the original application filed by Geostar, applications were filed by McCaw Space Technologies, Inc., MCCA American

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[1] *See Notice of Proposed Rule Making* in General Dockets 84-689 and 84-690, adopted July 12, 1984, 49 Fed. Reg. 36512.

Radiodetermination Corporation, and Omninet Corporation.

4. On July 25, 1985, the Commission adopted a *Report and Order* in the above captioned proceeding amending Part 2 of its Rules to allocate frequencies for RDSS.[2] The *Report and Order* provided allocations for RDSS in the following bands: 1610–1626.5 MHz band for radiodetermination user uplinks; 2483.5–2500 MHz for radiodetermination user downlinks; and, 5117–5183 MHz as a communications link for computational functions of the system. In taking this action, the Commission also indicated that issues concerning technical standards and licensing policies and procedures will be treated in a further proceeding.

5. Petitions for reconsideration of the *Report and Order* were filed by Omninet Corporation (Omninet), and Wismer and Becker Contracting Engineers/Transit Communications Inc. (Transit). A petition for limited clarification was submitted by Rockwell International Corporation; and, a petition for partial reconsideration was filed by the National Academy of Sciences. A list of comments and replies to the petitions is contained in the attached appendix. The petitions are discussed below.

DISCUSSION

6. *Omninet Petition.* Omninet, in its petition, requests confirmation that the *Report and Order* did not resolve certain issues. In particular, Omninet seeks confirmation that the Commission did not address the range of services that RDSS licensees will be authorized to provide or the comparative accuracies of competing RDSS technologies. It is Omninet's belief that these issues have been deferred to the second phase of this rule making. Omninet believes that the Commission should permit RDSS operators to offer a wide array of thin route services, including two-way voice and data services. In addition, Omninet claims its GPS-based RDSS system is more accurate than that proposed by Geostar.[3]

7. Several parties oppose Omninet's petition. Mobile Satellite Corporation (Mobilsat), believes that the petition raises serious questions about the fundamental nature of the radiodermination satellite service, expecially the question of whether RDSS frequencies should be permitted to be used for what it considers to be a

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[2] *See Report and Order* in General Dockets 84-689 and 690, adopted July 25, 1985, 50 Fed. Reg. 39101.

[3] Omninet would use the Global Positioning System (GPS) which operates in other frequency bands to provide position location information. Omninet asserts that such an approach would be more efficient and less costly.

Mobile Satellite Service (MSS). Similarly, Skylink Corporation argues that RDSS and MSS are fundamentally different kinds of services, each with its own optimal technical characteristics.

8. Omninet is correct in its reading of the *Report and Order*—we did not seek to specifically limit the services that RDSS licensees will be authorized to provide nor did we make any finding with regard to the comparative accuracies of RDSS technologies. These matters will be addressed at such time as the applications are evaluated and a decision is made with regard to a licensee. We make no finding with regard to Omninet's assertions that thin route services should be permitted in RDSS spectrum. We only reaffirm our belief that RDSS and MSS are sufficiently different that separate and distinct allocations are warranted. We have elaborated on the reasons in both the *Report and Order* establishing an allocation for RDSS and in our *Notice of Proposed Rule Making* in Gen. Docket No. 84-1234 proposing to establish a MSS.[4] No new information has been submitted by Omninet or others to alter this position.

9. *Wismer and Becker/Transit Communications Petition.* In its petition, Transit asserts that a GPS-compatible MSS system could provide all the functions of an RDSS system with less spectrum, at less cost, and with proven technology. Transit believes that the Commission's lack of consideration of a GPS-compatible MSS is a major policy oversight. Further, Transit states that the Commission has failed to acknowledge the similarities between RDSS and MSS, and has, in effect, given a competitive headstart to RDSS proponents. Transit also states that since MSS and RDSS will compete with each other in the marketplace, the Commission should, at a minimum, ensure a "level playing field" for both services. In summary, Transit requests that the Commission reconsider its RDSS decision in light of more spectrum efficient systems, or alternatively, refrain from acting on RDSS applications until the MSS allocation issue

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[4] *See* Notice of Proposed Rule Making in General Docket 84-1234, adopted November 21, 1984, 50 Fed. Reg. 8149, at para. 44. There we stated that we saw little possibility that MSS offerings could be providing in the spectrum allocated for the RDSS without compromising planned radio-determination services. While there may be some overlap between MSS and RDSS, we believe they serve different customer needs. RDSS is intended primarily to provide radiodetermination information with some ancillary message capability. MSS is intended primarily to provide mobile voice and rural radio and telephone services. Thus, MSS is primarily a voice service while RDSS is not.

has been resolved and it is prepared to grant MSS applications as well.

10. In making its allocation decision, the Commission was aware of proposals to utilize GPS for positioning information. Nevertheless, it was found to be in the public interest to allocate spectrum for a radiodetermination service to be developed by the private sector. Transit has presented no new facts or information that persuade us that our initial decision is inappropriate. In our view, providing spectrum for an alternative system to GPS is beneficial in that services can be tailored to the needs of the market. Transit's planned use of GPS in conjunction with its proposal to operate in the MSS, has no bearing on applications to operate in the RDSS.[5] We find no merit with regard to Transit's request that the RDSS application process be delayed until the Commission is ready to act on MSS applications. We believe that such an approach would unnecessarily deny the benefits of RDSS services to the public wihout any countervailing benefits. In this regard, the Commission continues to believe that while RDSS and MSS service providers may compete in a limited fashion, for most users, MSS and RDSS represent different services directed at different user need.

11. *Rockwell Petition*. Rockwell, in its petition for limited clarification, takes issue with a statement in the *Report and Order* that the proposed RDSS would provide certain capabilities that are not currently available by means of any other radio service.[6] Rockwell argues that with "differential" techniques, the GPS will provide superior accuracies and be more fail-safe than other systems. Rockwell urges that the Commission clarify the *Report and Order* in this limited respect. Omninet supported Rockwell on this issue.

12. Our original statement which gave rise to this issue was premised on GPS positioning capabilities as currently made available to the public without technical or computational enhancements. We believe that in this regard the statement was accurate. However, it was not our intention to imply that an enhanced GPS system could not provide the same degree of accuracy as RDSS.

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[5] Transit filed an application with the Commission for a license to operate in the mobile satellite service. It did not file an application in the radiodetermination satellite service.

[6] Rockwell is one of the prime developers of the NAVSTAR Global Positioning System (GPS) network.

13. *National Academy of Sciences Petition.* NAS, in its petition, requests that the Commission reconsider that part of the *Report and Order* that denied primary allocation status for radio astronomy in one of the bands allocated for RDSS. NAS requests that a portion of the RDSS user uplink band, namely, 1606.8–1613.8 MHz, be allocated on a primary basis to the radio astronomy service. In support of its request, NAS states that: study of hydroxyl molecular emissions at 1612 MHz yields information that cannot be obtained in any other manner; technical standards alone cannot adequately protect the radio astronomy service; refusal to upgrade radio astronomy to co-equal primary status may joepardize attempts to obain international agreement for a primary allocation to RDSS; only one of six radio astronomy sites is currently in a radio quiet zone; and, no parties have objected to its request for primary status.

14. The responses to the NAS petition were mixed. Omninet indicated support for the co-equal primary allocation and indicated it would ensure that user transceivers will not transmit signals on 5 kHz channels in the 1610.6–1613.8 MHz band from inside a radio astronomy region. Geostar felt that the extensive arrangements it had already devised together with the Academy would suffice.[7] Similarly McCaw indicated that the Radio Astronomy Service would be adequately protected under the RDSS spectrum allocation plan.

15. NAS, throughout this proceeding, has expressed concern about potential interference from RDSS to radio astronomy. NAS concedes, however, that secondary status is not necessarily a problem in the United States. While we are sympathetic to the goal of achieving greater global protection for these observations, the pleadings before us indicate that the allocations and controls promulgated in this proceeding are sufficient to assure adequate protection for radio astronomy observations at this time. If in the future, however, it appears that further protection is necessary we will revisit this matter.

16. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Omninet Corporation and petition for limited clarification filed by Rockwell International Corporation ARE GRANTED to the extent indicated herein; and, the petition for

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[7] NAS has developed a time sharing protection method with Geostar. Under this scheme, Geostar would restrict transmissions during the first 200 milliseconds following the one second time marks of Coordinated Universal Time when users enter Radio Astronomy during a period of radio astronomy observations in the 1606.8–1613.8 MHz band. *See Report and Order, supra,* at 5 and Appendix D.

reconsideration filed by Wismer and Becker/Tranist Communications, Incorporated and the petition for partial reconsideration filed by the National Academy of Sciences ARE DENIED. Authority for this action is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 4(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

License, Renewal of

Memorandum Opinion and Order adopted granting the license renewal application. Action taken as a result of the Commission's determination that the public interest would be served by such a grant. Petition to deny the grant failed to raise any substantial question of fact regarding programming representations.

—*Riverside B/cing Co. Inc.*

FCC 86-236

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Application of	
RIVERSIDE BROADCASTING COMPANY, INC.	File No. BRH-810139UP
For Renewal of License of Station WKHK(FM), New York, New York	

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1986; Released: May 14, 1986

BY THE COMMISSION:

1. The Commission has before it, on remand from the United States Court of Appeals for the District of Columbia Circuit: (i) the subject license renewal application of Riverside Broadcasting Company, Inc. ("Riverside"), licensee of Station WKHK(FM),[1] New York, New York, filed January 30, 1981; (ii) a petition to deny that application, timely filed on April 29, 1981 by Citizens for Jazz on WRVR, Inc. ("Citizens"); (iii) an opposition to the petition by Riverside; (iv) a reply by Citizens; (v) the *Memorandum Opinion and Order*, released April 15, 1983, 53 RR 2d 1154 (1983), denying the petition and granting Riverside's renewal application without hearing; (vi) Citizens' petition for reconsidera-

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[1] Effective October 24, 1980, the station's call sign was changed from WRVR(FM) to WKHK(FM). On January 21, 1984, the station's call sign was changed again, this time to WLTW(FM).

tion, filed May 9, 1983; (vii) Riverside's opposition to the petition for reconsideration; (viii) the *Memorandum Opinion and Order*, released July 18, 1984, 56 RR 2d 618 (1984), denying the petition for reconsideration; and (ix) the decision of the Court of Appeals for the District of Columbia Circuit in *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

2. On July 24, 1978, Viacom International, Inc. ("Viacom"), and the former owner of Riverside, Sonderling Broadcasting, Inc. ("Sonderling"), filed with the Commission an application to transfer control of Riverside from Sonderling to Viacom (BTCH-780724EI). In the transferee's portion of the application form (FCC Form 315), Viacom stated that it would continue the station's present format, under which approximately sixty (60) percent of the station's air time was devoted to jazz music. *See* transfer application, Exhibit M, *quoted in* petition to deny, at 8. The application was granted on November 28, 1979, and the transfer of control was consummated on March 25, 1980. On September 8, 1980, the entertainment format of WKHK(FM) was changed from jazz to country-and-western music.

3. When Riverside's broadcasting license came up for renewal, Citizens filed a petition to deny the subject renewal application, alleging *inter alia* that Viacom had misrepresented its programming intentions to the Commission in its transfer application. In support of this allegation, Citizens submitted the affidavit of Carole Lee, a former station employee, who stated that Roy Sonderling, Vice President of Sonderling, and David Meyer, an attorney for Viacom, had told her before the transfer application was granted that Viacom would change the station's programming format. Citizens also cited the following circumstantial evidence of a prior intent to change format: (i) the day after the transfer, two executives of Viacom's country-and-western stations were appointed National Program Director and President of Viacom's Radio Division; (ii) the practical difficulties of arranging a million-dollar advertising campaign and establishing a new identity and format as quickly as Viacom did (i.e., in less than one month) after the date Viacom asserted that the decision to change format was made (August 4, 1980); and (iii) public statements by the station's general manager and Viacom's new Radio Division President explaining that the reason for the change was poor audience ratings going back to 1977, which ratings were known by Viacom prior to the filing of the transfer application. In response, Riverside filed affidavits of Sonderling and Meyer wherein they denied having made the statements attributed to

them by Lee, and denied any knowledge of a format change at the time of the alleged statements. Riverside also filed affidavits of its Radio Division President and its Chairman and Chief Executive Officer, stating that format changes were not even proposed until June of 1980, and that no commitment to change was made until August of that year.

4. In denying the petition to deny, the Commission "stated that it [would] not disqualify an applicant for alleged misrepresentation unless it had a reasonable degree of certainty that deliberate misrepresentation had occurred'." Citing *Service Electric Company*, 86 FCC 2d 69, 93 (1981). The bulk of petitioners; 'evidence'," the Commission said, "consists of speculation based upon the actions of the licensee which the petitioners believe shows a plan to deceive the Commission and the public. However, the petitioners' speculation is unsupported by the external evidence necessary to show intent to deceive. 53 RR 2d at 1157. In denying the petition for reconsideration, the Commission noted that:

> Citizens also charges that the standard of evidence applied in the Order—that the burden is on the accuser to show misrepresentation by evidence that is "clear, precise and indubitable"—is actually the standard to be applied during a hearing, not before. However, in order to raise a substantial and material question of fact necessitating such a hearing, the petitioner must provide specific allegations of fact which are capable of meeting such a burden. The "evidence" submitted by petitioners did not constitute such a showing.

5. On October 29, 1985, the Court of Appeals for the District of Columbia Circuit remanded the case to the Commission. *Citizens for Jazz on WRVR, Inc. v. FCC, supra*. The Court "f[ou]nd it impossible to hold that [Lee's, Sonderling's and Meyer's] statements, together with the weak inference from the uncontested facts, required a finding that a substantial question concerning misrepresentation was presented." 775 F.2d at 396. The Court held, however, that the Commission had misapplied the standards applicable to a determination of whether or not the information before the agency presented a "substantial and material question of fact" requiring a hearing.

6. Under the Court's analysis of the statute, the Commission must determine: (i) whether or not the petition to deny, standing alone, meets the statutory requirement of setting forth "specific allegations of fact sufficient to show that" granting the application would be *prima facie* inconsistent with the public interest, convenience and necessity; (ii) whether all of the information

before the Commission, including information provided by the licensee, raises a susbstantial and material question of fact warranting a hearing; and (iii) whether the public interest, convenience and necessity would be served by granting the license renewal application. The remand was occasioned by the Court's concern that the Commission had improperly, as far as its express reasoning was concerned, "applied the third-determination standard to the second-determination issue." *Id.* at 396. That is, that the Commission "required the evidence to establish 'clear, precise and indubitable' proof of misrepresentation, instead of merely raising a 'substantial question' concerning that fact." *Id.* at 396.[2] The Court, accordingly, remanded the case to the Commission to reassess the evidence under the proper standard. However, we need not make these determinations separately, as "a negative resolution to the second question alone makes the first question moot and the answer to the third question foreordained." *Id.*, at 396. The central issue before us, then, is whether, on the basis of all of the information before the Commission, there remains a "substantial and material question of fact" with respect to Viacom's programming representations to the Commission.

7. The issue here centers on the "substantiality" of the questions raised by petitioner. "Substantial" in this context means whether or not "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." 775 F.2d at 395. *See also Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 330 (D.C. Cir. 1974); *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968). Having reviewed the entire matter again in light of the Court's decision we still do not believe that the information presented by the petitioner and the licensee arouses sufficient doubt about the veracity of Viacom's programming representations to raise a "substantial" question of fact. Therefore, we do not believe a hearing is required.

8. The only uncontested facts in Citizens' petition to deny consist of: (i) the promotion with the Viacom organization,

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[2] The Court noted that the "clear, precise and indubitable" standard applied in the Commission *Orders* was disapproved (in favor of the "preponderance of the evidence" standard) by the Review Board in *Overmyer Communications Co.*, 54 FCC 2d 1045, 1060 (1975). However, the Court stated, "since petitioners has not challenged the application of a higher-than-usual standard of proof to the merits determination, we assume, without deciding, that it is correct." 775 F.2d at 395, note 1. The Court is correct that ordinarily the burden at hearing is satisfied by a preponderance of the evidence. *Overmyer, supra. See also St. Cross Broadcasting, Inc.*, 49 FCC 2d 996, 997 (1974); and *Lewel Broadcasting, Inc.*, 86 FCC 2d 896, 913-4 (1981).

immediately after the transfer, of two executives with special backgrounds in country-and-western programming; (ii) the temporal proximity of the format change to the consummation of the transfer and the decision to alter formats, and the "practical difficulties" involved in such a change; and (iii) the low audience ratings of the jazz format at the time of transfer. Thus, the only uncontested factual evidence presented by the petitioners is purely circumstantial, and the inference of misrepresentation drawn from that evidence by the petitioner amounts to no more than speculation and conjecture. Since, during the time period in question, three of Viacom's radio stations programmed a country-and-western format,[3] it is hardly surprising that executives with that background were promoted within the organization. The fact that Viacom drew from its internal talent pool to fill corporate positions does not necessarily tend to show that Viacom misrepresented its programming intentions to the Commission. Further, while Viacom, as potential transferee, was undoubtedly aware of the low ratings of the jazz format going back to 1977, such knowledge, or statements of such knowledge, do not tend to demonstrate that a decision had been made to change format prior to or at the time of filing of the transfer application. With regard to the "practical difficulties" involved in changing a station's programming format in such a short time period, such matters do not tend to belie Viacom's assertion that the format switch was indeed accomplished within six months of consummation and one month of the decision to proceed with the format change. The fact that such rapid format alteration would be "difficult" does not give rise to an inference that it did not occur as represented, especially in light of direct testimonial evidence that the Chief Executive Officer of Viacom would rescind his approval if it appeared that the new format had not been "properly and viably developed." Opposition to Petition for Reconsideration, Exhibit 10, at 3, ¶ 15. Finally, and most critically, none of the circumstantial evidence demonstrating an "intent to deceive," which traditionally has been the *sine qua non* of a misrepresentation issue. *See C.B.S., Inc.*, 49 FCC 2d 1214, 1223 (1974), *cited in LeFlore Broadcasting Co., Inc. v. FCC, supra*, at 461.

9. The only direct evidence submitted by petitioner which might arguably show such "intent to deceive" consists of the affidavit of Carole Lee, a former employee of WKHK(FM). Ms.

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[3] Those stations were KIKK, Pasadena, Texas; KIKK(FM), Houston, Texas; and WMZQ(FM), Washington, D.C. *See 1980 Broadcasting/Cablecasting Yearbook.*

Lee asserts that the Vice President of transferor Sonderling and an attorney for transferee Viacom told her prior to the transfer that the station's format would be changed. However, neither of the individuals who allegedly told Ms. Lee that the format would be changed was remotely responsible for designing or implementing such a change, *see* 775 F. 2d at 396, and both of those individuals, who presently have no interest in Viacom, have supplied affidavits in which they categorically deny having made such statements to Ms. Lee. Further, additional affidavits from the Viacom officials who *were* responsible for the station's programming immediately after the transfer deny the existence of any plan to change the station's format. As the Court stated, "none of [petitioner's uncontested circumstantial evidence] is necessarily inconsistent with an innocent view of events, and the inference of guilt was directly refuted by sworn affidavits of no intent to change format." *Citizens for Jazz on WRVR v. FCC, supra*, at 396. In view of the foregoing, we find that petitioner has raised no substantial and material question of fact regarding Viacom's alleged misrepresentation of its programming intentions *vis-a-vis* WKHK(FM).

10. Having found that Citizens has raised no substantial and material question of fact regarding Viacom's programming representations, no further impediment remains to the grant of the WKHK(FM) renewal application. Therefore, we conclude that the public interest would be served by the grant of Riverside's license renewal application. Accordingly, IT IS ORDERED, that the petition to deny the license renewal application of Riverside Broadcasting Company, Inc., for Station WKHK(FM), filed April 19, 1981, by Citizens for Jazz on WRVR, Inc., IS DENIED.

11. IT IS FURTHER ORDERED, that the license renewal application, filed by Riverside Broadcasting Company, Inc., for Station WKHK(FM), New York, New York, IS GRANTED.

12. IT IS FURTHER ORDERED, that the Chief, Mass Media Bureau, shall send, by Certified Mail-Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding and to the Clerk, Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Radiodetermination Service
Rules, Amendment of

Second Report and Order adopted amending Part 25 of the Commission's rules with respect to the Radiodetermination Satellite Service. Specific action was taken in response to comments filed in the notice of proposed rulemaking pertaining to licensing policies and procedures.
—*Satellite Communications*
Gen Docket No. 84-689

FCC 86-209

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service	Gen. Docket No. 84-689 RM-4426
In the Matter of	
Policies and Procedures for the Licensing of Space and Earth Stations in the Radiodetermination Satellite Service	Gen. Docket No. 84-690

SECOND REPORT AND ORDER

Adopted: April 22, 1986; Released May 8, 1986

BY THE COMMISSION:

I. Background

1. On September 7, 1984, the Commission issued a *Notice of Proposed Rulemaking*, 49 Fed. Reg. 36512 (September 18, 1984) (*Notice*), proposing to allocate frequencies for a radiodetermination satellite service (RDSS)[1] and to establish associated licensing

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[1] The Commission's rules define "radiodetermination" as the determination of position, or the obtaining of information relating to position, by means of the propogation properties of radio waves. *See* 47 C.F.R § 2.1. "Radionavigation"

policies and procedures. This *Notice* was adopted in response to a petition for rulemaking and an RDSS system application filed with the Commission by Geostar Corporation (Geostar). To expedite initiation of this new service to the public and to provide a concrete framework for the establishment of governing rules, the *Notice* was released with an accompanying public notice accepting Geostar's application for filing and inviting other applications to be submitted for concurrent consideration.[2] Extensive comments were filed on both the frequency allocation and licensing portions of the rulemaking.[3] In addition, Omninet Corporation (Omninet), MCCA American Radiodetermination Corporation (MARC), and McCaw Space Technologies, Inc. (McCaw) filed system applications, and Geostar submitted an updated proposal.

2. Finding a need for RDSS, the Commission, on July 25, 1985, allocated frequencies in the 1610–1626.5 MHz, 24983.5–2500 MHz and 5117–5183 MHz bands for use by the radiodetermination satellite service.[4] Based on a detailed evaluation of the comments pertaining to licensing policies and procedures, as well as the system applications filed, this *Second Report and Order* adopts policies and rules to govern the provision of RDSS service to the public. In separate actions, we will authorize those RDSS system proposals that comply with our policies and rules; entities which have filed non-complying proposals will be given 60 days from the release of the orders acting upon the individual applications to amend their applications to bring them into conformance.

II. Procedural Issues

3. As an initial matter, several commenting parties have questioned the rulemaking and application processing procedures adopted in the *Notice*. Maximum Service Telecasters (MST) and

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is radiodetermination used for purposes of navigation, including obstruction warning, and "radiolocation" is radiodetermination for purposes other than those of radionavigation.

[2] FCC 84-320, Report No. DS-305. The filing date for applications was subsequently postponed until April 5, 1985. *See* Order, Mimeo No. 1369 (released December 14, 1984) (*Clarification Order*); Order, Mimeo No. 3449 (released March 26, 1985), extending the filing dates.

[3] *See* Appendix A for a list of commenting parties.

[4] Report and Order, 50 Fed. Reg. 39101 (September 27, 1985) (*Allocation Order*). A fourth frequency band at 6525–6541.5 MHz is to be used for central station-to-satellite transmissions. This band is already allocated to fixed-satellite service, and thus, by definition, may be used by RDSS. Petitions for Reconsideration of the *Allocation Order* were filed and are addressed in a separate order. Memorandum Opinion and Order, FCC 86-163 (adopted April 10, 1986).

Transit Communications, Inc. (TCI) argue that acceptance and processing of applications in advance of final rules is improper and prejudges the frequency allocation rulemaking. Mobile Satellite Corporation (Mobilesat) contends that the Commission prematurely accepted Geostar's system as the "baseline" for radiodetermination satellite system design and operation. Other commenters have requested that this proceeding be consolidated with the Commission's pending rulemaking in Gen. Docket No. 84-1234 regarding the establishment of a land mobile satellite system (MSS)[5] because, in their view, RDSS and MSS would essentially offer the same types of services to customers.[6] None of these arguments persuades us that the procedures adopted were improper.

4. The Commission crafted parallel rulemaking and licensing proceedings in an effort to expedite the introduction of this new technology and service to the public and to ensure that any rules and policies adopted would reflect concrete proposals for these innovative systems. The procedural objections raised with respect to this procedure have been previously raised and considered fully by the Common Carrier Bureau, acting under delegated authority, in an order released December 13, 1984.[7] We affirm the Bureau's findings. The Commission has wide discretion to adopt whatever procedures "will best conduce to the proper dispatch of business and to the ends of justice."[8] Parallel rulemaking and processing of applications has often been employed by the Commission and has been affirmed by the courts.[9] Further, the adoption of Geostar's general design as a baseline was to provide a point of reference for other applicants when submitting proposals. The "baseline" did not contain any specific technical parameters but advanced

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[5] Notice of Proposed Rulemaking, 50 Fed. Reg. 8149 (released February 28, 1985).

[6] *See* comments of MST, Utilities Telecommunications Council (UTC), Omninet, Central Committee on Telecommunications of the American Petroleum Institute (API), TCI.

[7] *Clarification Order*, note 2, *supra*.

[8] 47 U.S.C. § 154(j). *See, e.g.*, FCC v. Schreiber, 381 U.S. 279 (1965); SEC v. Chenery, 332 U.S. 194 (1947).

[9] *See* Nat'l Assn of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) (direct broadcast satellite rulemaking and applications considered concurrently); Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975) (domestic satellite rulemaking and applications considered concurrently). Although TCI argues that the DBS and domsat proceedings are not analogous to the RDSS proceeding because there were no substitutes for those services and no serious technical criticisms of the proposed systems had been raised, this premise is incorrect and will be rejected. TCI has not convinced us that the procedure fashioned here was an improper exercise of our discretion.

only a generic random access time division multiplex (TDM) technique as a means of accomplishing multiple entry.[10] The Commission explicitly left open the possibility that the final regulations would require a different system design. Indeed, one applicant has proposed a design incompatible with the "baseline" and that proposal is receiving full consideration here. For these reasons, the procedure fashioned in the *Notice* neither prejudged the frequency allocation rulemaking nor system design to be ultimately adopted. It afforded all parties a full opportunity to be heard, and was a reasonable exercise of the Commission's discretion to fashion procedures promoting efficiency of process.[11]

5. In addition, arguments to combine the RDSS and MSS proceedings were rejected in the RDSS *Allocation Order*, where the Commission found a need for private radiodetermination service and allocated frequencies for the provision of that service. Moreover, because different frequency bands have been proposed for the provision of RDSS and MSS, and no proposal submitted in either proceeding employs a single satellite system operating in both frequency bands, there is no reason to tie the two proceedings together. Thus, we will continue to process the system applications filed in each proceeding separately.

III. Multiple Entry Policies

6. One of the general objectives discussed in the Commission's *Notice* was to license multiple RDSS systems. The Commission stated that multiple entry appeared technically feasible, and would benefit the public by allowing competition in the provision of RDSS. This policy might also make it possible to avoid conducting comparative evaluations of the applicants or establishing other processing procedures, and would allow a wide variety of RDSS offerings to be made available without delay. Comment was therefore solicited on the feasibility of licensing multiple systems to operate in the proposed spectrum. The Commission noted that the Geostar design appeared to allow several independent systems to operate, and required RDSS applicants proposing different technologies to demonstrate how multiple systems could be accommodated under their proposals.[12]

7. The comments support a competitive radiodetermination service. Potential RDSS users state that competition will provide constraints on pricing and ensure continued innovation.[13] All

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[10] *See Notice* at para. 34; *Clarification Order* at para. 10.

[11] *See Clarification Order*, note 2 *supra*, for a more detailed discussion.

[13] Comments of Vertex, Inc.; Occidental Petroleum Corp.; Soaring Society of

applicants state that multiple entry is possible, although Omninet urges that this policy should not be pursued at the cost of adopting a less efficient system design.[14] While technical efficiency is a desirable goal, we have found that the benefits of competition, including continued innovation, will be best provided by independently licensed multiple systems.[15] A design permitting only one system to operate would have to be unquestionably superior to justify a departure from this policy. Moreover, comparing the efficiencies of technically disparate system proposals becomes less meaningful if these systems are designed to provide different services. We will select the system design that best assures that the benefits of a competitive marketplace are made available to RDSS users.

IV. System Design

A. The Proposals

8. As stated, the *Notice* adopted a random access TDM satellite design as the "baseline" design. All applicants proposing random access TDM operations were to be considered compatible with the baseline regardless of specific modulation characteristics, power levels or coding schemes.[16] The Commission emphasized that it would consider applications that proposed different, incompatible system designs, but required entities filing these proposals to demonstrate how that design was superior to random

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America; J. Boats, Inc.; Andrew F. Inglis; Mobile Data Int'l, Inc.; James E. Lawrenz; Marine Navigation, Inc.; Seashore Recovery & Salvage.

[14] TCI similarly contends that although multiple entry may be achieved with systems such as Geostar's, the capacity of these systems would be so low as to make their economic viability questionable. However, the fact that three applicants have proposed compatible systems demonstrates that service providers believe that multiple systems are viable.

[15] *See* Competitive Common Carrier Services, 85 FCC 2d 1 (1980), (*First Report & Order*), *modified*, 91 FCC 2d 59 (1982) (Second Report and Order), *further modified*, 93 FCC 2d 54 (*Third Report & Order*), *further modified* 95 FCC 2d 554 (1983) (*Fourth Report & Order*), *further modified* 98 FCC 2d 1191 (1984) (*Fifth Report & Order*), *further modified* 57 Rad. Reg. 2d (P&F) 1391 (1985) (*Sixth Report & Order*), *vacated sub nom.* MCI Telecommunications Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985).

[16] *Clarification Order* at para. 10. After the *Notice* was adopted, Geostar submitted supplemental information indicating that it had modified its satellite design from a slotted ALOHA to a spread spectrum multiple access scheme. Because several parties contended that this design was no longer compatible with the baseline, Geostar was asked to submit a complete and updated application in light of the *Clarification Order* no later than the filing date for other applications to be considered concurrently with Geostar's. *Clarification Order* at para. 11.

access TDM and how multiple entry would be accomplished.

9. Three applications, as well as a comprehensive Geostar application, were filed in response to the *Notice*.[17] Three of the four applicants, Geostar, MARC and McCaw, propose systems employing spread spectrum modulation techniques.[18] All applicants assert that a spread spectrum design is superior to other designs because it increases the capacity of the system and enhances the potential for multiple access. All applicants represent that their systems will be used to provide RDSS and ancillary messaging capability. Although the transmission parameters and power levels on each system vary, the three applicants claim that their systems are compatible and, with some coordination, will be able to share the same bandwidth.[19]

10. Omninet, the other applicant, claims that the accuracy, capacity and ability of the three systems to accommodate simultaneous users are substantially overstated, while the cost of equipment and price of services are understated. It also asserts that a spread spectrum design is inherently inefficient, and will not permit meaningful multiple entry because of its limited capacity.[20] In addition, none of the applicants, according to Omninet, has provided a market analysis demonstrating a substantial demand for a system providing RDSS services on a primary basis.

11. Omninet proposes a system using a different technology. Claiming that the public will best be served by allowing the

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[17] MST, NAB, and NAS opposed these applications on grounds relating to the frequency allocation issues. These concerns were addressed in the *Allocation Order*, and those discussions will not be repeated here.

[18] In the spread spectrum scheme proposed by these applicants, users transmit at the same time and at the same frequency, but separate their signals by modulating them with unique pseudorandom number code sequences. Users generally access the system on a random basis at different instants of time. Thus, each of these three systems may be considered compatible with the baseline design of "random access" and "TDM". In any case, the applicants have demonstrated why the currently proposed spread spectrum techniques are superior to the previously submitted designs and how multiple entry may be accomplished using a spread spectrum design.

[19] Geostar, for example, asserts that the three systems can accommodate 364 simultaneous users.

[20] Omninet also states that although MARC has adopted Geostar's basic design, MARC indicated that a system employing frequency division multiple access (FDMA) may be more efficient. MARC, however, merely suggests that separating the spread spectrum signals of each system by means of frequency division (and thus reducing the bandwidth available to each system) may be superior, but does not provide a concrete proposal for such a system. MARC's submitted spread spectrum design, which occupies the entire allocated bandwidth, rather than this theoretical alternative, is the one that will be evaluated and considered.

spectrum to be used to provide a wide range of thin-route satellite services, including RDSS, Omninet proposes a system capable of two-way voice communications. It proposes to provide radiodetermination services primarily by accessing the government's NAVSTAR global positioning system (GPS), a partially completed positioning system that will be available to civilian users, and relaying GPS-derived data to users. To allow for voice capacity, Omninet's proposed system is designed with a narrowband frequency division multiple access (FDMA) architecture, i.e., it will establish 5 KHz user channels and will allocate bandwidth for users on a random access basis as required by traffic demands.[21] This technology is incompatible with spread spectrum systems because omnidirectional user antennas cannot discriminate between satellites operating in the same frequencies serving the same area, and a significant amount of antenna discrimination is needed if both types of RDSS systems are to operate compatibly in the same frequency band. Thus, Omninet's proposed system cannot operate sharing bandwidth with the other applicants.[22]

12. Omninet asserts that its proposed design is more spectrally efficient than the "baseline" design because it provides both thin-route MSS and RDSS services, and does not use large amounts of spectrum to duplicate the GPS, which Omninet claims is as accurate as the proposed spread spectrum systems. It further asserts that its system is more economically efficient than that of the other applicants. Although Omninet states that licensing more than one Omninet-type system may not be feasible for the first generation of satellites, it suggests that multiple entry may be achieved by authorizing one coordinated satellite system to be shared by multiple providers with separate ground segments and marketing mechanisms.[23] It asserts that the total capacity of such a system is greater than the total capacity of

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[21] Although Omninet's system may be "random access", as would any MSS system, radiodetermination services are not proposed to be provided by time division multiplexing among users.

[22] In its comments, TCI states that a GPS-compatible MSS system would be superior to the Geostar design on file. TCI, however, did not submit a proposal for such a system in this proceeding. Because the Commission stated that it would base any technical rules for RDSS systems on the concrete proposals before it, we need not consider TCI's theoretical system here. In any case, Omninet's proposal which is being considered here is similar to the one suggested by TCI.

[23] Omninet indicates that the multiple entry possibilities are greater with a second generation satellite design. Omninet Application at Volume II, Section 5.4.2.

several independently licensed spread spectrum systems, and thus is superior.[24] As a "compromise" position, however, Omninet proposes a "band-splitting" approach, allowing both the spread spectrum and Omninet designs to be authorized. Omninet suggests that the bandwidth assigned for user-to-satellite and satellite-to-user transmissions be divided equally into two segments, with each segment assigned to a different technology. Omninet argues that by authorizing an FDMA system to use half the bandwidth, and the remaining spread spectrum systems to share the other half, the marketplace will be the ultimate arbiter between technologies and services.[25]

13. Omninet's proposed system is opposed by Geostar, McCaw and several potential RDSS customers. No potential RDSS users have supported Omninet's application. Geostar asserts that Omninet's proposal does not envision competition, is premised on unreliable market analysis, is more costly to users than Geostar's, is not as accurate as Geostar's, and does not use the RDSS spectrum to provide radiodetermination services. Seatronics, Inc. and Guilford Transportation Industries, Inc. (Guilford) state that the civilian GPS will not provide the level of accuracy needed to meet their needs. Emery Worldwide argues that a GPS-MSS system is not as cost-effective as a system that concentrates both position location capability and communications capability in a single ground station, as Geostar's does. Emery Worldwide and Guilford further assert that a voice based FDMA system cannot support as many simultaneous users as a spread spectrum system. In addition, Omninet's "band splitting" approach is opposed by Geostar and McCaw, and is not endorsed by any other party. Geostar asserts that this approach would substantially impair the accuracy and performance of spread spectrum RDSS systems by reducing the available bandwidth and would reduce the capability for multiple entry, while Omninet's system would not be as affected because it operates using 5 KHz channels.[26] Omninet responds that the loss in accuracy for spread spectrum systems will be 10–15%, but can be compensated for by

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[24] Omninet asserts that spread spectrum RDSS systems would have difficulty co-existing in the same band, and that spread spectrum design therefore has no advantage over an FDMA design in supporting multiple entry.

[25] Omninet urges that the Commission not mandate a joint venture or consortium arrangement in either of the allocations, but instead allow the parties to work together on a voluntary basis to forge their own cooperative agreements.

[26] The Sony Corporation of America also asserts that reducing the bandwidth would have an extremely negative effect on RDSS accuracy and that the full potential of RDSS will not be realized unless the full frequency band proposed is allocated. Comments of Sony Corporation of America at 4.

using additional benchmark earth stations. It further asserts that multiple entry for the spread spectrum systems will not be impaired because multiple systems are impractical even using the entire bandwidth.

B. Discussion

14. The four applications before us may be grouped into two distinct and incompatible system proposals. The first proposal, comprised of the Geostar, McCaw and MARC applications, uses a wide-band, spread spectrum technique to provide private RDSS and ancillary message service. The other application, filed by Omninet, proposes a hybrid MSS–RDSS system using narrowband FDMA techniques and employing GPS to provide radiodetermination services to users. The applicants concede that the two proposals are technically incompatible, requiring the Commission to determine how the public interest will best be served.

15. MSS and RDSS are intended to serve different customer needs—RDSS to provide radiolocation and radionavigation information with limited, ancillary message capability, and MSS to provide mobile voice and rural radio and telephone services. MSS is primarily a voice service; RDSS is not. Proceedings have been instituted considering licensing systems providing each service. Omninet's proposed system is essentially an MSS system, with RDSS provided as an ancillary service.[27] In fact, Omninet filed virtually identical system applications in the RDSS and MSS proceedings, and requested that its RDSS application be withheld from public inspection until its MSS application was filed.[28] Omninet has also stated that customers will have the option of subscribing to its proposed RDSS-band system without position determination capability.[29] Although the Commission has indicated that it would consider systems providing both MSS and RDSS in the RDSS bands, it stated that it believed that the two services were distinct and involved different technologies, and

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[27] Omninet's proposal is in contrast to the three other applicants in the RDSS proceeding, who propose systems in which data packets are exchanged between user transceivers and a central station and the timing of the transmissions is used to determine the position of the user transceiver. These systems permit only the relay of short alphanumeric data messages incorporated into the position determining data pulses. Omninet's proposal is fundamentally similar to the proposals for mobile voice services filed in the MSS proceeding.

[28] This request was denied in an April 19, 1985 letter from Chief, Common Carrier Bureau to Dean Burch.

[29] Omninet Opposition to Petitions to Deny Omninet's Application at 31.

placed the burden on the proponent of the combined system to demonstrate it would best serve the public interest.[30]

16. Omninet has failed to convince us that authorizing its system to use the entire RDSS bandwidth is an efficient use of the spectrum allocated to RDSS. As stated, Omninet has filed a virtually identical proposal in the MSS proceeding that is under consideration for authorization there. Further, because GPS derived position information need not be relayed via satellite, Omninet's proposed radiodetermination service could be provided by any two-way mobile system whether terrestrial or satellite.[31] Using the RDSS bands to duplicate services that can be provided elsewhere is unwarranted considering that private RDSS is different from any available service and may be provided only over the frequencies allocated for that service.

17. Moreover, Omninet has not demonstrated that its proposed system will best serve users. First, we do not believe that the demand for private RDSS service is so limited that the public would best be served by a system providing a variety of thin-route services, as Omninet asserts. The Commission has found a demonstrated need for private RDSS in the *Allocation Order* and a wide range of potential RDSS users urge that Geostar's application be approved.[32] Second, no potential RDSS users support Omninet's application, while several question whether a GPS-plus communications link system, as Omninet proposes, will meet their need for accurate, low-cost, two-way communications service. Third, Omninet's design does not allow

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[30] *Notice of Proposed Rulemaking* in Gen. Docket 84-1234, note 5, *supra*, at paras. 43-44.

[31] For example, cellular, SMR and two-way paging systems can relay GPS derived information.

[32] *See* comments of American Red Cross (Claremont, CA Chapter), Marine Navigation, Inc., Emery Worldwide, Contract Freighters, Inc., Brookes & Gatehouse, Inc., Nat'l Ski Patrol, Transocean Air Lines, Int'l Ass'n of Natural Resource Pilots, Penn Jersey Piper, U.S. Coast Guard, Western Airlines, Seatronics, Istac, Inc., Guilford Transportation, Cordis, Contact Radio-Phone, Piper Aircraft Corp., North American Household Goods, Aeronautics Dep't of Cypress College, L.Y. Ltd., Paul A. Soderline Associates, J Boats, U.S. Dep't of Commerce/Bureau of Census, Sperry Corporation, Mt. San Antonio College, Eaton Yachts, Christopher D. Koss, Office of State Engineer of Colorado/Division of Water Resources, Dr. Lee Valentine, Dep't of Justice/Drug Enforcement Administration, Leaseway Transportation Corp., Sony Corporation of America, Paul G. Story, Arnautical, Inc., Andrew F. Inglis, Capt. Lowell E. Heacock, Westar Insurance Brokers, Inc., Flying Magazine, Seashore Recovery & Salvage, Soaring Society of America, Occidental Petroleum Corp., Vertex, Inc., Southeastern Colorado Water Conservancy District, Marine Navigation, Inc., James E. Lawrenz, Mobile Data Int'l, Theron S. Jobson, University of Montana, United Airlines, Aircraft Owners and Pilots Ass'n, North American Van Lines, Boise Cascade Corp.

for multiple entry. Rather than allowing multiple systems, Omninet contemplates competition through one coordinated system shared by multiple providers that is not a Commission mandated joint venture or consortium. Omninet has not convinced us that its system is in any way superior to that proposed by the other applicants or that the competitive benefits provided by independently licensed RDSS systems are outweighed by its system design. Our experience with introducing competition into a variety of different communications services over the last several decades has been that the public benefits associated with competition, such as increased choices and lower prices for consumers, are more likely to be realized where there is competition among providers. Independently operating RDSS systems which are possible through the spread spectrum technology will be more competitive than systems that only offer different marketing possibilities, as proposed by Omninet. We also recognize that Omninet's system, using MSS technology to provide MSS services, is a nonconforming use of the domestic frequency allocations. Although nonconforming uses may be permitted pursuant to waiver if there is no prospect of causing interference to conforming operators, Omninet has not demonstrated a compelling justification for a waiver or that its system will not in fact cause interference.[33] Accordingly, we will not authorize Omninet's system, which would duplicate the type of system it is proposing in the MSS bands, to use the entire bandwidth allocated to RDSS.

18. We further conclude that spread spectrum systems should operate using the entire bandwidth allocated for RDSS, and reject Omninet's "band splitting" proposal.[34] Equally dividing the spectrum between Omninet's system and the other systems will reduce the capacity of spread spectrum systems by at least half since the system bit rate will have to be cut by half to fall within

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[33] The power flux density produced by Omninet's system is -131 dB (W/m^2-4kHz) which is significantly higher than the -139 dB (W/m^2-4kHz) value produced by spread spectrum systems such as Geostar's.

[34] Omninet first suggested this proposal in its Replies to Oppositions to its system application. Omninet later filed "Supplemental Comments," and a "Motion for Leave" to file those comments, elaborating on its "band splitting" plan and raising a procedural concern over the timing of the individual RDSS authorizations. Geostar and McCaw filed oppositions to Omninet's motion, contending that the "Supplemental Comments" raised nothing not already in the record. Although we recognize that Omninet has had ample opportunity to comment fully on all aspects of this proceeding, and has taken full advantage of this opportunity, we will consider Omninet's pleadings as informal comments because doing so will not delay the resolution of this proceeding. *C.f.* 47 C.F.R. § 21.30(b).

the assigned spectrum. We also accept the Geostar assessment of the loss in accuracy as valid. The only support Omninet provides for its assertion that the loss in accuracy is not substantial is an article describing the relationship between bandwidth and processing gain, hence, bit error rate, of the continuous GPS transmission. No technical basis was offered by Omninet to apply this analysis to the Geostar design. In addition, Omninet has not responded to the assertion that dividing the bandwidth will reduce the capability for multiple entry, other than by asserting that multiple entry is impractical in any case.[35] Even potentially impairing RDSS systems becomes unwarranted when it is considered that system proposals such as Omninet's are currently under review in the MSS proceeding and may be authorized there. Further, a decision to restrict RDSS systems to half of the allocated spectrum will be difficult to change if the service proves successful. Once a spread spectrum system has been designed for a given bandwidth, a later increased allocation is likely to have little utility since the wider bandwidth cannot be used until all transceivers are either replaced or upgraded to handle the wider bandwidth.[36] Thus, we are choosing the technology more closely associated with RDSS than the technology more closely associated with MSS to use the entire RDSS bandwidth. To do otherwise will disadvantage RDSS licensees and users with no apparent benefit because a system such as Omninet proposes will be considered in the MSS proceeding should frequencies be allocated.

19. Thus, we will authorize the spread spectrum system proposals now before us. Omninet has not convincingly rebutted the applicants' representations that this system design will permit multiple entry. We will adopt the minimal technical standards necessary to ensure that multiple entry may be implemented.[37]

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[35] The Commission has recognized that additional allocations do not appear available for commercial applications of radiodetermination service. *See Notice* at para. 29. Thus, the capacity of spread spectrum systems to allow multiple entry is important as a means of accommodating industry growth.

[36] Because a spread spectrum system operates at a fixed transmission rate, all transceivers must be designed for that bit rate. While different power level transceivers can be accommodated within the system by compelling them to transmit only during the time frames designated for the particular power level, all transceivers must have the same bandwidth to receive the interrogation signal properly.

[37] In the *Notice*, the Commission proposed to apply the requirements of Part 25 of its Rules and Regulations to RDSS and requested proposals for any additional rules or rules changes necessary. In response, Geostar submitted a comprehensive set of technical and administrative rule provisions. Omninet was the only party objecting to these proposals. These objections are no longer

Therefore, we will not mandate specific system parameters or coding schemes but will leave it to the permittees to coordinate any technical differences.[38] These technical rules will be incorporated into Part 25 of the Commission's rules in a new Section 25.292 governing licensing of RDSS systems, and are delineated in Appendix B.[39] In addition to these rules, the frequency tolerance and emission limitation standards of Sections 25.202(e)-(g) will be applicable to RDSS as a general matter.

20. We will provide all nonconforming applicants an opportunity to amend their system proposals to comply with these rules.[40] All applicants can be authorized using this system design. Any applicant that proposed a nonconforming system will be given 60 days from the release of the Commission order acting upon its individual application to submit an amended system proposal. Action on nonconforming applications will be deferred until this period has run. Authority is delegated to the Chief, Common Carrier Bureau to act on RDSS applications in accordance with the policies adopted in this order.

21. Finally, although these rules are designed to implement efficient RDSS technology, we recognize that conforming spread spectrum systems are nevertheless capable of providing non-voice services other than radiodetermination. In the *Notice*, we stated that we did not propose to prohibit any ancillary or incidental services provided that the primary purpose of the satellite is to provide RDSS. We affirm this proposal. Our intent in implementing the RDSS rulemaking was to provide, if need warranted, an accurate radiolocation and radionavigation system. Finding such a need in the allocation proceeding, we seek here to allow for the establishment of a competitive RDSS industry. Permitting operators to provide primary messaging, paging or other non-voice mobile services would be inconsistent with our allocation for

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relevant in light of the system design we have adopted today. We will, however, adopt only those elements of Geostar's proposed rules that are essential to establish RDSS.

[38] We do not find it necessary to repeat in Part 25 the power flux density limit already contained in US307 allocating the 5117-5183 MHz band to RDSS.

[39] Revisions to other sections of Part 25 are also warranted as described in para. 32 *infra.*

[40] In its Supplemental Comments, Omninet urges that the Commission process and authorize all four pending applications as a group so that no party has a "head start" over the others. We will not delay the issuance of permits to qualified applicants and the implementation of their RDSS systems while they wait for nonconforming applicants to file amended applications. Moreover, because all conforming applications will be granted, we do not see how a 60-day amendment period to bring applications into conformance will provide any applicant with a competitive advantage.

RDSS and would impede meaningful competition in the provision of RDSS. Thus, although we will not prohibit auxiliary or incidental message service from being provided over RDSS systems, we will require RDSS to be the primary service offered. This service requirement will be incorporated into the RDSS rules.

IV. Financial Qualifications

22. In addition to the technical standards delineated above, financial standards are warranted for RDSS licensees. The *Notice* proposed to require all applicants to proceed expeditiously with the construction and launch of their proposed systems.[41] To this end, we required all applicants to submit complete financial information and a detailed business plan with well-defined milestones for construction, documenting their claims that they are prepared to proceed with construction and launch of their proposed systems immediately upon Commission grant.[42]

23. Given the huge costs and long lead time involved in constructing and launching a satellite system, the Commission traditionally has required satellite applicants to demonstrate their financial qualifications. Examination of an applicant's financial qualifications ensures that the orbit-spectrum resource is not tied up by entities unable to fulfill their plans, and also serves to discourage the filing of speculative applications. Further, a determination of an applicant's financial ability helps to ensure that service is promptly made available to users. This general principle, however, must be considered in the context of the specific service to be provided. RDSS is a new, innovative and as yet unproven service and applicants without substantial internal assets may have difficulty obtaining the large amounts of financing necessary to construct, launch and operate these systems.[43] Moreover, all applicants who have filed RDSS applications can be accommodated today, and it appears feasible to authorize additional RDSS applications in the future.[44] Thus, licensing applicants that do not have the current ability to finance their

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[41] *Notice* at para. 35.

[42] *Id.* Specifically, the Commission required the submission of detailed schedules of investment and operating costs, estimated revenue requirements, the source and amount of committed or potential financing, the source and amounts of estimated revenues or income from the proposed satellite operations, a current balance sheet and current operating statement. *See* Public Notice, Report No. DS-305 (released September 7, 1984).

[43] The investment costs for the proposed systems average over $300 million.

[44] Geostar estimates that up to 12 systems with a spread spectrum design can operate simultaneously.

entire system will not preclude other qualified applicants from implementing their RDSS system plans at this time.[45] In view of these considerations, we find it desirable to permit licensees to obtain financing for their project in stages. We will not, however, permit licensees an open-ended opportunity to arrange complete financing nor will we allow merely speculative applicants to receive licenses with the aim of benefitting from the Commission's regulatory processes. We will therefore require all applicants to demonstrate their financial preparedness to assume the costs and liabilities of constructing and launching the system and operating it for one year.[46] We will also require those receiving licenses to adhere to defined progress milestones in construction and launch of their systems.

24. Thus, all applicants must demonstrate that sufficient funds are or will be available to meet the costs of constructing, launching and operating the system for one year. Any applicant relying on internal funds to finance its system must submit a balance sheet current for the latest fiscal year and documentation of any financial commitments reflected in the balance sheet demonstrating that it has current assets sufficient to meet its estimated construction, launch and first year operating expenses. If the applicant is owned by more than one corporate parent, it must submit evidence of commitment to the proposed satellite program by management of the corporate parent upon whom it is relying. Applicants relying on external sources of funding must submit an exhibit indicating that the estimated income or revenues anticipated from the proposed operation of the satellite system are sufficient to meet the estimated construction, launch and first year operating costs not met by internal funds, along with any additional information requested by the Commission, which would include scheduled debt financing or stock issues,

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[45] Such is not the situation in the well-established domestic satellite industry. Domestic satellite applicants are therefore required to demonstrate sufficient current assets and operating revenues to cover all construction and launch costs and first year operating expenses. Licensing Space Stations in the Domestic Fixed-Satellite Service, FCC 85-395 (released August 29, 1985).

[46] This test is identical to the one adopted for private international satellite operators in Establishment of Satellite Systems Providing International Communications, FCC 85-399 (released September 3, 1985). Private international satellite service is also a new, unproven service, and all entities applying to provide that service should be licensed. Although the financial showing required by private international applicants is made in two stages because of the necessity for INTELSAT Article XIV(d) coordination, INTELSAT Article XIV(d) coordination is not necessary for RDSS licensees, and thus it is the second tier showing, made after coordination is completed, that is analogous to RDSS licensing.

established lines of credit or other forms of internal financing. This type of information was required to be submitted in the RDSS applications currently on file to document the applicants' claims that they are prepared to proceed with system implementation immediately upon grant. This showing will also be required for any future RDSS applicants. Applications not meeting these criteria will be denied.

25. We will also require all licensees to proceed with the construction and launch of their system in compliance with several specified milestones.[47] Using the milestones the applicants have proposed in their RDSS applications as guidelines, we have arrived at the following timetable. All licensees are required to begin construction of at least the first satellite of the system within one year of grant of the construction permit, and must begin construction of the remaining satellites within two years of grant. Construction of the first satellite must be completed within four years of grant. Full systems must be launched and operational within six years of the date of grant. These milestones will ensure that RDSS systems are being implemented in a timely manner and will allow the maximum number of RDSS systems to be accommodated and operational to the benefit of users. Licensees must notify the Commission as these milestones are met. Failure to fulfill these conditions will render the authorization null and void and another proposed system will become eligible in its place.[48]

VI. Services Regulation

26. In the *Notice*, the Commission stated that it did not propose to impose common carrier obligations on RDSS providers. We observed that in providing radiolocation, the content of the communications remains under the licensee's control and thus is not a common carrier service. Furthermore, we stated that the ancillary messaging capability of RDSS does not give rise to common carrier obligations under the controlling test set forth in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 830 (D.C. Cir.); *cert. denied*, 425 U.S. 999 (1976). We did not anticipate that there would be any necessity to impose a

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[47] Similar milestones are used in the domestic satellite and direct broadcast satellite industries. *See, e.g.*, In re CBS, Inc., 92 FCC 2d 64 (1982).

[48] Failure to obtain the financing necessary to proceed according to schedule will not be considered to be circumstances beyond the control of the licensee. For unforeseen circumstances deemed to be beyond licensee's control, *see* Harold A. Jahnke, 74 FCC 2d 276 (1978); Leon County Communications Corp., 29 FCC 2d 56 (1971); Integrated Communications Systems, 25 FCC 2d 909 (1970).

"legal compulsion" upon RDSS or its ancillary message features to serve the public indifferently nor did it appear that the service would be offered as an "indifferent holding out to the eligible user public."[49] We requested comment on our regulatory proposal.

27. The commenters unanimously agree that common carrier obligations should not be imposed on RDSS providers.[50] All applicants and a wide range of users assert that RDSS offerings must be permitted to be tailored to meet the needs of individual customers and that common carrier obligations will impede this ability. They further agree with our tentative conclusion that neither RDSS nor ancillary message services require common carrier regulation. In view of the service requirements adopted today, we affirm our tentative conclusions in the *Notice* and will not impose common carrier obligations on RDSS licensees.

VII. Transceiver Licensing

28. As a final regulatory matter, the question of licensing individual transceivers must be addressed.[51] These transceivers will operate in the 1610–1626.5 MHz band, and in the 2483–2500 MHz band that is shared on a primary basis with those fixed, temporary-fixed and mobile stations that had been operating in that band when the reallocation for RDSS was made.[52] Rather than requring individual transceivers to be licensed, we proposed a flexible blanket licensing approach, where either the space station licensee or a service vendor would hold the authorization and responsibility for a specified number of user units.[53]

29. Both parties commenting on this issue support a blanket licensing policy, and we will adopt this procedure.[54] RDSS transceivers do not fall within any of the exceptions to the licensing requirement of the Communications Act and each must therefore be licensed.[55] We do not, however, find it advisable to

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[49] *See Notice* at paras. 38–40 for a detailed discussion of our analysis.

[50] *See* comments of Geostar, Omninet, MARC, McCaw, Vertex, Inc., Occidental Petroleum Corporation, Soaring Society of America, J Boats, Inc., Andrew F. Inglis, Mobile Date International, Inc., James F. Lawrenz, Marine Navigation, Inc., Seashore Recovery and Salvage. Omninet's comments, however, are based on its proposal, which would offer a wide-variety of thin-route MSS services including RDSS. Because we are requiring licensees to provide RDSS on a primary basis, we need not consider Omninet's analysis.

[51] The central earth station and telemetry, tracking and command earth station facilities transmit in frequencies allocated to the fixed-satellite service and can be routinely licensed in that service pursuant to Part 25 of the rules.

[52] *See Allocation Order* at paras. 18–20.

[53] *Notice* at para. 44.

[54] *See* comments of Geostar, Omninet.

[55] *See* 47 U.S.C. § 307(e) which allows the Commission to authorize by rule the

require individual users to apply for licenses. Doing so would provide no meaningful way for other primary users in the 2483–2500 MHz band to coordinate their transmissions. Further, we recognize the large costs and burdens involved in issuing individual licenses for potentially thousands of units. We therefore conclude that a blanket licensing procedure for a specified number of units is the most efficient and useful way of licensing transceivers.[56] The license term for a blanket authorization will be ten years from the date of grant. Requests for authority to include additional transceivers in the blanket authorization will be treated as minor modifications to the authorization. We will vest the responsibility for obtaining licenses and for coordinating any interference problems with other primary users with the service provider. Although this will be the system licensee in most cases, we recognize the possibility that resellers may access RDSS systems and provide service with their own transceiver units.[57]

VIII. Future Applications

30. To permit a competitive RDSS industry to develop, applications for new RDSS systems may be filed after the release of this *Report and Order*. Each application should set forth all pertinent technical and operational aspects of the system, and the technical, legal and financial qualifications of the applicant. In particular, each applicant should include the information specified in Appendix B of *Space Station Application Filing Procedures*, 93 FCC 2d 1260, 1265 (1983), except that in lieu of demonstrating compliance with item II.F (two degree spacing), applicants are required to demonstrate compatibility with licensed RDSS systems. Applications not containing all required information will be returned as unacceptable for filing. Each application for a space station will be placed on public notice, during which time interested parties may comment and applications to be considered concurrently may be filed.

31. Service vendors filing blanket applications for transceiver units should use FCC Form 403 and specify the number of

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operation of radio stations without individual licenses in the radio control service and the citizens band radio service.

[56] The Commission has not required individual licenses for large networks of identical earth station antennas or for land mobile radio facilities. Routine Licensing of Large Networks of Small Antenna Earth Stations, Mimeo No. 3588 (released April 9, 1986); Schlumberger Technology Corp., Mimeo No. 4658 (released June 7, 1984); Individual Licensing Procedures in the Public Mobile Radio Services, 77 FCC 2d 84 (1980).

[57] All service providers will be required to maintain a point of contact for coordination purposes.

transmitting units to be covered by the blanket license. A licensee qualification report, FCC Form 430, should also be submitted if a current one is not already on file for Part 25 facilities. Applicants should also demonstrate that transceiver operations will be compatible with other operations in the spectrum. These application requirements are incorporated in Section 25.292.

IX. Other Rule Provisions

32. In addition to the establishment of rules governing RDSS, other changes to the Commission's rules are warranted. Sections 25.201 and 25.202 are amended to reflect the definition of this radio service and the frequency bands available for RDSS. We will also include a provision in Part 25 indicating that RDSS operations are subject to the provisions of Appendix D of the *Allocation Order* dealing with sharing between RDSS and radioastronomy.

X. Conclusion and Ordering Clauses

33. In adopting rules and policies to govern a new radiodetermination service, we have sought to allow the establishment of a competitive industry with minimal regulation. The policies fashioned here will permit the public to be provided with needed radiodetermination service in a timely manner.

34. In our *Notice*, we tentatively concluded, pursuant to Section 605(b) of the Regulatory Flexibility Act that the actions in this proceeding would not have a significant economic impact on a substantial number of small businesses. No comments addressed our analysis, and we affirm our tentative conclusion. Because of the large financial resources necessary, the Commission has not received, nor does it anticipate receiving, a substantial number of applications from small businesses for authority to construct and operate satellite systems providing radiodetermination satellite services.

35. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

36. Accordingly, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i) and 303(r), IT IS ORDERED that applications for radiodetermination satellite systems SHALL BE SUBMITTED in accordance with the standards

restrictions and requirements specified in this decision. Authority is delegated to the Chief, Common Carrier Bureau decision to act upon these applications in accordance with the policies adopted in this order.

37. IT IS FURTHER ORDERED that applications for large numbers of technically identical transceiver units will be processed rountinely in accordance with the procedures specified in this decision.

38. IT IS FURTHER ORDERED that the policies and procedures set forth in this *Report and Order* ARE EFFECTIVE immediately, and that Part 25 of Chapter I of Title 47 of the Code of Federal Regulations IS AMENDED, effective immediately, as set forth in Appendix B. Pursuant to 5 U.S.C. § 553(d), we find that good cause exists for implementing these rules immediately. The *Notice of Proposed Rulemaking* gave notice that we contemplated licensing systems concurrently with adopting governing rules and policies. Moreover, all applicants are granted 60 days from the release of the Commission orders acting upon their individual applications in which to file amendments to bring their applications into conformance with any additional requirements.[58] Accordingly, the effective date of Section 25.392 and the other attached rule revisions will be May 8, 1986.

39. IT IS FURTHER ORDERED that the proceedings in Gen. Docket Nos. 84-689 and 84-690 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A—may be seen in FCC's Dockets Branch, 1919 M St, N.W., Wash., D.C.

Appendix B

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. § 54. Interpret or apply Secs. 101-104, 76 Stat 419-427; 47 U.S.C. 701-744.

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[58] *See* Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879-91 (D.C. Cir. 1979); *see also* Kessler v. FCC, 325 F.2d 673, 682 (D.C. Cir. 1963) (effectiveness prior to publication in the Federal Register).

2. By adding the following definition to Section 25.201 in the appropriate alphabetical position:

Radiodetermination Satellite Service: A radiocommunication service for the purpose of radiodetermination involving the use of one or more space stations.

3. By redesignating Section 25.202(a) as Section 25.202(a)(i) and adding a new subparagraph (a)(ii) as follows:

25.202. Frequencies, frequency tolerance and emission limitations.

(a) *Frequency Bands*. (i) * * *

(ii) The following fequencies are available for use by the Radiodetermination Satellite Service:

1610–1626.5 MHz: User-to-Satellite Link
2483.5–2500 MHz: Satellite-to-User Link

Fixed-Satellite service frequencies may be used for links between radiodetermination satellites and control centers, including the following designated bands, subject to the Rules in this subpart:

5117–5183.0 MHz: Satellite-to-Control Center Link
6525–6541.5 MHz: Control Center-to-Satellite Link

4. By adding new Section 25.392 as follows

25.392 Licensing Provisions for the Radiodetermination Satellite Service

(a) *Space Station Application Requirements*. Each application for a space station construction permit and/or license in the radiodetermination satellite service shall describe in detail the proposed radiodetermination satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal and financial qualifications of the applicant. In particular, each application shall include the information specified in Appendix B of *Space Station Application Filing Procedures*, 93 FCC 2d 1260, 1265 (1983), except that in lieu of demonstrating compliance with item II.F (two degree spacing), applicants are required to demonstrate compatibility with licensed radiodetermination satellite systems. Applicants must also file information demonstrating compliance with all requirements of this section, specifically including information demonstrating how the applicant has complied or plans to comply with the requirements of paragraph (f).

(b) *Space Station Application Procedures*. Each application for a new space station in the radiodetermination satellite service shall be placed on public notice for 60 days, during which time interested parties may file comments and petitions related to the application. A 60 day cut-off period shall also be established for the filing of applications to be considered in conjunction with an original application.

(c) *User Transcievers*. Individual user transceivers will not be licensed. Service vendors may file blanket applications for transceiver units using FCC Form 403 and specifying the number of units to be covered by the blanket license. FCC Form 430 should be submitted if not already on file in conjunction with other facilities licensed under this subpart. Each application must demonstrate that transceiver operations will be compatible with other operations in the spectrum.

(d) *Permissible Communications*. Stations in this service are authorized to render radiodetermination service, and may not render other services except as ancillary to the radiodetermination service.

(e) *Frequency Assignment Policies*. Each radiodetermination space station licensee will be assigned the entire designated frequency bands on a non-exclusive basis. Coding techniques and power limits as set forth in paragraph (f) below shall be employed to ensure compatibility with other radiodetermination satellite service systems.

(f) *Radiodetermination Satellite Service*. Licensees shall coordinate with other licensees to avoid harmful interference to other radiodetermination satellite systems through (1) power flux density levels; (2) use of pseudorandom-noise codes (for both the satellite-to-user link and for the user-to-satellite link); and (3) random access, time division multiplex techniques.

(g) *License Conditions*. All authorizations in the radiodetermination satellite service shall be subject to the policies set forth in the *Report and Order*, including compliance with Appendix D, and *Second Report and Order* in General Docket Nos. 84-689 and 84-690 and to any policies and rules the Commission may adopt at a later date.

Satellite Communications, Procurement

Memorandum Opinion and Order adopted denying the Petition for Reconsideration and dismissing the Motion of Stay filed by Aeronautical Radio, Inc. Regarding the Procurement Order, released January 7, 1986, FCC 85-666, which authorized COMSAT to participate in the procurement of three communications satellites and the Capitalization Order, released January 21, 1986, FCC 86-15, which Authorized COMSAT to raise $72 million in long-term external financing and short-term borrowing over the period 1985-1987. —*Satellite Communications*

FCC 86-260

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
COMMUNICATIONS SATELLITE CORPORATION	File No. CSS-85-002
Application for authority necessary to participate in a program for the purchase or lease of capacity in up to nine satellites to be used as part of the INMARSAT Second Generation Satellite Communications System.	
ARINC Petition for Reconsideration and ARINC Motion for Stay	
The 1985-1987 Consolidated Capitalization Plan of the Communications Satellite Corporation.	File No. I-S-P-85-002
ARINC Petition for Reconsideration	

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1986; Released: May 28, 1986

BY THE COMMISSION:

1. On January 7, 1986, the Commission released a Memorandum Opinion, Order and Authorization (Procurement Order) which authorized the Communications Satellite Corporation (Comsat) to participate in the procurement by the International Maritime Satellite Organization (INMARSAT) of three communications satellites.[1] These satellites will be part of the INMARSAT second generation global maritime system.[2] In an unrelated Memorandum Opinion and Order (Capitalization Order), we authorized Comsat to raise $72 million in long-term external financing and short-term borrowing over the period 1985 to 1987 to cover its share of INMARSAT's second generation satellite procurement.[3]

2. On February 6, 1986, Aeronautical Radio, Incorporated (ARINC) filed a Petition for Reconsideration and a Motion for Stay of the Procurement Order. Comsat opposed both the Petition and the Motion. On February 20, 1986, ARINC filed a Petition for Reconsideration of the Capitalization Order which Comsat also opposed. We deny both of ARINC's Petitions for Reconsideration and dismiss its Motion for Stay for the reasons set forth below.

DISCUSSION

Procurement Order

3. ARINC contends that the Commission exceeded its authority by authorizing Comsat to participate in the procurement of satellites which may carry aeronautical traffic in the future. ARINC asks the Commission to reconsider its Procurement Order and to reverse the part of the Procurement Order which authorizes Comsat's participation in the provision of aeronautical services through INMARSAT. ARINC argues that the International Maritime Satellite Telecommunications Act (Maritime Satellite Act)[4] does not authorize Comsat to provide aeronautical services because that Act restricts Comsat's participation in INMARSAT to maritime services only. It requests the Commission to order Comsat to withhold from INMARSAT payment of

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[1] INMARSAT Second Generation System (File No. CSS-85-002), FCC 85-666 (released January 7, 1986).

[2] This authorization was made under the authority of section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c) (1978), and sections 214, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 309 and 319.

[3] Memorandum Opinion and Order, 1985-1987 Capitalization Plan (File No. I-S-P-85-002); FCC 86-15 (released January 21, 1986).

[4] 47 U.S.C. §§ 751-757 (1978).

the portion of funds for the three second generation satellites which is attributable to aeronautical services.

4. ARINC's petition is misplaced and premature. It is misplaced to the extent that ARINC misconstrues the Commission's Procurement Order as authorizing Comsat to provide aeronautical services. This is not the case. Comsat did not request to expend funds for space segment development for aeronautical services, and we did not authorize it to do so. We authorized Comsat to participate in INMARSAT's procurement of three second generation satellites. This second generation procurement is warranted fully on the basis of maritime needs. Nevertheless, the design of the three second generation satellites that we authorized can accommodate operations in the frequency bands allocated to the aeronautical mobile satellite services. However, no additional expenditures were necessary or included in the contractual arrangements between INMARSAT and its second generation system contractor, British Aerospace, to achieve this capability. Similarly, the contractual arrangements do not include specific expenditures to modify the transponders or to add special features to the satellite hardware for aeronautical services.

5. ARINC's petition is premature because Comsat must file separate applications before it may participate in an INMARSAT program which will expend funds to modify second generation satellites for the provision of aeronautical services. Even if INMARSAT decides to provide aeronautical services via the second generation satellites as currently designed, Comsat still must file an application to provide space segment capacity to customers for aeronautical services and it must amend its earth station licenses to include the provision of aeronautical services. At that time, ARINC will have an opportunity to present its concerns in response to any applications. However, since we did not authorize Comsat to provide aeronautical services in our Procurement Order, there is no issue for reconsideration here, and there is no need to consider the scope of Comsat's authority under the Maritime Satellite Act at this time.

6. As to ARINC's assertion that Comsat will extend its "*de facto*" of maritime satellite services into the market for aeronautical satellite services, Comsat and INMARSAT are not acquiring a monopoly over aeronautical services. INMARSAT recently approved the text of a proposed amendment to its convention which would allow it to offer new services via satellite to the aeronauti-

cal community.[5] The amendment, however, will not require others to consult with INMARSAT before they may develop an alternative aeronautical system. Therefore, ARINC and others are not constrained by the decision in developing a competing aeronautical satellite system. Finally, on the question of whether INMARSAT's decision to provide aeronautical services will force the aviation industry to adapt its needs to the standards developed by INMARSAT, we find that INMARSAT is consulting with the International Civil Aviation Organization (ICAO) and with the International Air Transport Association to ensure that the needs of the aeronautical community are met. Further, INMARSAT's Council has discussed negotiating an agreement with ICAO to develop aeronautical services. These discussions, however, are not subject to the Commission's section 214 authority. To the extent ARINC is requesting the Commission to prevent further actions by INMARSAT, we cannot grant ARINC relief.

7. We dismiss as moot ARINC's Motion for Stay, since we have rendered a decision on its petition.

Capitalization Order

8. ARINC argues that the Capitalization Order allows Comsat to include in its jurisdictional rate base the capital costs for providing aeronautical services.[6] ARINC further alleges that the Commission is permitting Comsat to make payments to INMARSAT for aeronautical services that Comsat is unable to provide under the Maritime Satellite Act. It submits that this will result in Comsat's subsidization of aeronautical services used by foreign signatories. ARINC requests the Commission to reconsider its Capitalization Order and to disallow Comsat's capital payments for aeronautical services to INMARSAT

9. We have reviewed ARINC's petition and find that its objections to the Capitalization Order are without merit. We have authorized Comsat to contribute its obligatory share of the funds

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[5] Convention and Operating Agreement of the International Maritime Satellite Organization (INMARSAT), September 3, 1976, 31 U.S.T. 135; T.I.A.S. No. 9605. This amendment has not yet been ratified by the required number of signatories. INMARSAT also has undertaken studies on the issue of aeronautical services, but it has not yet made expenditures for satellite hardware to serve aeronautical needs which would require Comsat to seek Commission authorization.

[6] Jurisdictional items are activities which are mandated by the International Satellite Act of 1962, as amended by the Maritime Satellite Act of 1978. These activities include INMARSAT space segment services.

for three of INMARSAT's second generation satellites; we have not authorized it to finance aeronautical services. Furthermore, Comsat is obligated, as the U.S. signatory, to provide its share of funds for the second generation development. In any case, the consolidated capitalization proceeding is not the appropriate proceeding in which to resolve the question of Comsat's scope of services under the Maritime Satellite Act.

ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration of the Procurement Order filed by Aeronautical Radio, Incorporated IS DENIED.

11. IT IS FURTHER ORDERED that the Motion for Stay of the Procurement Order filed by Aeronautical Radio, Incorporated IS DISMISSED.

12. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Capitalization Order filed by Aeronautical Radio, Incorporated IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Frequency Assignment, Non-Broadcast
Private Land Mobile Radio Service
Rule Making, Notice of Proposed

Notice of Proposed Rule Making adopted proposing to amend Part 90 of the Commission's rules to make available additional frequency assignments for SMR systems in the 800 mHz band. Proposal implemented to increase the efficiency of SMR Systems and to provide better service to system users. —*SMR Systems*

PR Docket No. 86-160

FCC 86-213

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 90 of the Commission's Rules to Make Available Additional Frequency Assignments for SMR Systems in the 800 MHz Band	PR Docket No. 86-160 RM-5102

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1986; Released: May 8, 1986

BY THE COMMISSION:

Introduction

1. In response to a rulemaking petition by the National Association of Business and Educational Radio, Inc. (NABER)[1], this *Notice of Proposed Rule Making (Notice)* proposes to amend Section 90.621(g) of the rules to permit inter-category sharing of frequencies in the 800 MHz frequency band by SMRS, Industrial/Land Transportation, and Business eligibles.

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[1] Petition for Rule Making, RM-5102, filed July 2, 1985.

Background

2. SMR systems were established by the Commission in 1974 to permit entrepreneurs to provide a communications service to private radio licensees on a commercial basis. The decision to create such a service was a result of the Commission's land mobile radio service allocation proceeding in Docket No. 18262.[2] The *First Report and Order* in Docket No. 18262 reallocated 115 MHz of spectrum in the 800 MHz band for land mobile radio services.[3] The *Second Report and Order* designated 30 MHz (600 channel pairs) to private land mobile communications systems.[4]

3. Of the 600 available channel pairs, 100 conventional and 200 trunked channels were initially made available for immediate use. The remaining 300 channels were reserved for future use.[5] In August 1978, because of an increasing demand for 800 MHz frequencies, an additional 50 conventional channels were released, leaving 250 channels in reserve.[6]

4. In August 1982, the *Second Report and Order* of PR Docket No. 79-191 apportioned the remaining 250 channels among four categories as follows:[7]

Public Safety	70 channels
Industrial/Land Transportation	50 channels
Business	50 channels
SMRS	80 channels

Additionally, rules were adopted that permitted inter-category sharing after 18 months among all categories except the SMRS category. At that time we indicated that we were predisposed to eliminate the barriers between the categories after three years. However, we did not adopt specific rules on this matter at that time.[8] At present, inter-category sharing exists only among the non-SMRS categories.

The Petition

5. In its petition, NABER requests that the Commission's rules be amended to permit SMRS eligibles to access the frequencies in

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[2] Docket No. 18262 was initiated with a *Notice of Inquiry and Notice of Proposed Rule Making, see* 14 FCC 2d 311 (1968).

[3] *First Report and Order and Second Notice of Inquiry* (FCC 70-519), 35 Fed. Reg. 8644 (July 4, 1970).

[4] *See Second Report and Order*, 46 FCC 2d 752 (1974).

[5] *Id.* at paragraph 63.

[6] *Order*, FCC 78-854, 43 Fed. Reg. 35394, (August 9, 1978).

[7] *Second Report and Order*, PR Docket No. 79-191, (FCC 82-338), 47 Fed. Reg. 41002 (September 16, 1982).

[8] *Id.* at paragraph 66.

the Industrial/Land Transportation, Business, and Public Safety 800 MHz frequency categories in areas where all of the 800 MHz SMR channels are assigned. NABER states:

> The time is now appropriate for the Commission to review how the interservice sharing rules have worked to date and how best to extend this availability to SMRS eligibles while at the same time maintaining a balance that recognizes the continuing needs of large users. It is NABER's view that the inter-sharing rules should be expanded to the SMRS category.
>
> However, these new rules must be constructed so as to prevent the warehousing of frequencies by speculators while at the same time giving eligibles with immediate needs for frequencies and recognized success in serving eligibles access available frequencies. Thus, NABER requests that the Commission allow interservice sharing for fully-loaded, trunked, SMR licensees only. (Petition, at page 6)

NABER notes that its petition would provide limited, but necessary relief:

> By allowing fully loaded SMR Systems access to additional, compatible channels in the presently allocated pools on an inter-category sharing basis, SMR base station licensees who have proven their ability to operate efficient operations will be given in certain geographic areas some spectrum relief. In this regard, NABER does not believe that inter-category sharing by SMRS will result in significant spectrum relief in the top seven urban areas. However there may be the possibility for some limited relief in cities eight through twenty. (Petition, at page 8)

6. The petitioner proposes that to assure that SMRS requests to share spectrum of other categories are reasonable, the Commission should either: (a) assign additional channels to a loaded SMR system only to the extent the SMR system licensee can demonstrate that it has current users, or (b) assign only the number of additional channels which the SMR system will load within a time period of 8-12 months after grant. In addition, the petitioner proposes that any inter-category sharing by SMR systems be subject to frequency coordination to enable coordinators to maintain accurate data bases.

Comments on the Petition

7. Seven sets of comments were received on the petition.[9]

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[9] The Associated Public Safety Communications Officers, Inc. (APCO), the Special Industrial Radio Service Association, Inc. (SIRSA), the Central Committee on Telecommunications of the American Petroleum Institute (API), the Association of American Railroads (AAR), and the International Taxicab Association (ITA) opposed the petition. The American SMR Network Association (ASNA) and Motorola, Inc. (Motorola) supported the petition.

NABER submitted the only reply comments. APCO, SIRSA, and API, opposing the petition, cite NABER's own admission that SMR systems would only obtain limited relief should the proposed rule changes be adopted. APCO, AAR, and API assert that frequencies in the non-SMRS categories must be held in reserve for use by users presently eligible in those categories. ITA argues that the demand for SMR licenses is far greater than the demand for SMR service and that NABER has not supplied any factual basis for Commission action. ITA also states that the Commission's actions in the *Report and Order* of PR Docket No. 85-6, which allowed loaded SMR systems to receive waiting list priority for the licensing of system expansions, were intended specifically to provide the relief sought by NABER in its petition.

8. ASNA, in support of the petition, asserts that fully-loaded SMR systems should be accorded reasonable access to non-SMRS category spectrum. ASNA states:

> There are currently nineteen markets in the country with waiting lists for trunked frequencies. Most of these lists include applications from existing SMRS licensees whose systems are loaded, or more likely overloaded, and must expand. While the Commission recently adopted rules which will give these applicants a preferred status for channels recovered in the FCC's take back program, the number of SMRS licensees expected to lose channels for non-construction or insufficient loading is decreasing at the same time that the number of applicants seeking expansion capacity is increasing. The new regulations will provide welcome relief for some licensees, but access to additional spectrum is also needed. (ASNA comments, page 3)

Motorola also supports NABER's petition, noting that "[t]he most pressing concern is to allocate additional SMRS channels from inter-pool sharing in a manner which will give SMRS needed channels, but will not encourage channel hoarding."

Discussion

9. We have reviewed the petition and the comments and believe that the petition has sufficient merit to warrant issuing this *Notice*. However, after analysis of the issues, we are proposing rules that differ somewhat from those requested by the petitioner.

10. Trunked SMR users have emerged as the dominant users of the 800 MHz spectrum. It is also a demonstrated fact that the spectrum efficiency of a trunked system increases as the number of channels in that system increases. In the major urban areas there is a backlog of applicants on waiting lists for SMR frequencies. Existing fully-loaded SMR systems are unable to

quickly obtain additional usable 800MHz channels and, therefore, cannot achieve increased system and spectrum efficiency, much less meet the growing demand for mobile communications services. Contrary to some of the comments received on the petition, we feel that there is a need for fully-loaded SMR systems to have access to additional channels in the 800 MHz band. By way of illustration, a recent Commission count indicated that of the approximately 500,000 mobile units in the 800 MHz band, about 315,000 were licensed in the SMRS category. We also recognized the increased demand for SMR channels in PR Docket No. 84-1233, in which we are proposing to designate additional channels at 900 MHz for SMR system use.[10]

11. While additional channels in a different frequency band may become available for SMR service as a result of that proposal, existing 800 MHz SMR systems desiring to expand will be unable to use those channels because of equipment incompatibility. Consequently, in areas where all 800 MHz SMR category channels are assigned, other than by purchasing other systems, SMR systems can only expand by obtaining frequencies made available as a result of the Commission's channel recovery program[11], or by inter-category sharing with the other three categories, i.e., Public Safety, Industrial/Land Transportation, and Business. Before proposing this latter option, we must consider the impact such action would have on the other categories.

12. With regard to the Public Safety category, Congress has instructed the Commission to "carefully consider the legitimate needs of public safety agencies in managing the private land mobile spectrum,"[12] Congress has also mandated that the Commission prepare a national public safety communications plan, which is presently under preparation. We recognize the vital nature of public safety communications and are committed to assure, to the maximum extent feasible, that public safety organizations have the spectrum they need to provide essential services to the public. Accordingly, pending completion of the national plan and further study, we will not propose that SMR systems be allowed entry into the Public Safety category at this time.

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[10] *Notice of Proposed Rule Making*, PR Docket No. 84-1233, 50 Fed. Reg. 1582 (January 11, 1985).

[11] Channels are recovered from SMR licensees who fail to meet either the construction period or mobile loading requirements of Section 90.631 of the rules. *See* 47 C.F.R. § 90.631 (1985).

[12] *Conference Report* No. 97-765, 97th Cong. 2nd Sess., August 19, 1982, at page 52. See also FCC Authorization Act of 1983, P.L. No. 98-214, 97 Stat. 1467.

13. With respect to the Industrial/Land Transportation and Business categories, we recognize that in some of the larger urban areas, all or most of the 800 MHz frequencies available for trunking have been assigned. NABER recognizes that inter-category sharing will provide only limited relief in the top 20 urban areas. API indicates that under the NABER proposal, it is most likely that only single channels will be made available to fully-loaded SMRS licensees and that the marginal return to these users will be minimal. While the addition of only one channel to a fully-loaded trunked system of five channels or more may not significantly increase the efficiency of the system, API does not dispute that efficiencies are gained. One additional channel could allow the use of many more mobiles or, in the case of overloaded systems, would reduce the waiting time to access the system, thus providing more efficient service to the end user. Therefore, even though the relief afforded by NABER's proposal will not fully remedy the condition that prompted it, allowing SMR systems to participate in inter-category sharing extends our overall inter-service sharing policy and furthers our goal of increasing the efficiency of existing spectrum.

Proposal

14. We propose to amend Section 90.621(g), of our rules to allow fully-loaded, trunked 800 MHz SMR licensees to participate in inter-category sharing with the Industrial/Land Transportation and Business categories when frequencies are not available in the SMRS category. However, to accommodate eligibles in these two categories who have a need for frequencies for expansion of existing systems or to implement new systems, it is necessary to establish criteria for determining when fully-loaded SMR systems can invoke inter-category sharing.

15. In that regard, we propose that an SMR licensee demonstrate that it has current users equal to or greater than the present loading requirement, *i.e.*, 80 mobiles, portables, and control stations (units) per channel.[13] A five-channel SMR system with 400 units would be eligible for one additional channel unless it can be shown that the system can be immediately loaded to warrant more than one additional channel. Alternatively, we could require that the SMR system would be assigned only the number of channels which it can load within a time period of 12 months

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[13] *See* Section 90.627 of the rules and *Memorandum Opinion and Order* in Docket No. 79-191, 48 Fed. Reg. 51917, November 15, 1983, paragraphs 13 and 14.

after grant. Limiting inter-category sharing to only fully-loaded SMR systems should alleviate ITA's concern that requests for SMR licenses far exceed requests for SMR service. However, we request comments on any alternative means of determining how many additional channels a fully-loaded SMR system licensee could apply for in the other two categories.

16. The primary objective of this *Notice* is to provide some relief for SMR systems to obtain additional channels. At the same time, we believe that inter-category sharing should be reciprocal and that licensees in the Industrial/Land Transportation and Business categories should also be able to use the SMRS category for any available frequencies. This would further extend our inter-service sharing policy by making needed frequencies available to more users. We propose, therefore, to allow licensees in the Industrial/Land Transportation and Business categories with fully loaded systems to be eligible for inter-category sharing with the SMRS category when frequencies are not available in any non-SMRS category.

17. Inter-category frequency coordination is necessary to maintain an accurate data base. Therefore, we are also proposing that SMR applicants requesting frequencies in the Industrial/Land Transportation or Business categories obtain frequency coordination from the coordinator for the category involved before filing an application with the Commission. SMRS applications for expansion of fully-loaded systems that request an SMRS category frequency, or that do not specify a frequency, will be dismissed if SMRS category frequencies are not available. SMRS applications submitted directly to the Commission specifying an out-of-category frequency (or no frequency but asking for any available out-of-category frequency), will be dismissed with a statement that the application should be submitted either to the coordinator in the Industrial/Land Transportation or Business category for the required frequency recommendation and coordination.

18. Similarly, a licensee with a fully-loaded system in either the Industrial/Land Transportation or Business category wishing to expand, must obtain a statement from all applicable coordinators that no frequencies are available in the Industrial/Land Transportation, Business, and Public Safety categories before it requests a frequency in the SMRS category from the Commission.

19. The proposed rules are presented in the Appendix. In addition to the issues specifically raised in this *Notice*, any other comments related to the subject are invited.

Initial Regulatory Flexibility Analysis

20. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's initial analysis is as follows:

I. Reason for action

The Commission believes that its rules should be amended to permit inter-category sharing of 800 MHz frequencies by fully loaded SMR systems wishing to expand. This action would allow SMR systems to access additional frequencies, this increasing the efficiency of the systems and resulting in better service to system users.

II. Objectives and legal basis

The proposed action will provide a certain measure of spectrum relief for SMR systems desiring to expand. The proposed action is authorized under Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended.

III. Reporting, recordkeeping and other compliance requirements

No new requirements will be imposed upon licensees in the Private Land Mobile Radio Services.

IV. Federal rules which overlap, duplicate or conflict with this rule

None.

V. Description, potential impact, and number of small entities affected

The availability of additional channels to SMR systems for expansion is expected to result in increased business efficiency.

VI. Significant alternatives

There are no significant alternatives besides those considered in this *Notice.*

Paperwork Reduction Act Statement

21. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase or decrease burden hours imposed on the public.

Procedural Matters

22. For purposes of this non-restricted notice and comment rule making proceeding, member of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addressed the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding, must prepare a written summary of that presentation. On the day of that oral presentation, a written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 C.F.R. 1.1231.

23. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Interested persons may file comments on or before June 30, 1986, and reply comments on or before July 15, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order.

24. In accordance with the provision of Section 1.419 of the Commission's Rules, 47 C.F.R. Section 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11

copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C. 20554

26. For further information concerning this rule making contact Eugene Thomson, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554 (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 90- Private Land Mobile Radio Services

The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

1. Section 90.261(g) is revised in its entirety to read:

§ 90.621 Selection and assignment of frequencies

* * * * *

(g) The channels listed as available for eligibles in the Public Safety, Industrial/Land Transportation, Business, and SMRS categories are available on a shared basis to all persons operating in the same geographical area and eligible in these categories under the following conditions:

1. Channels in the Public Safety category will be available to eligibles in the Business and Industrial/Land Transportation categories only if there are no frequencies in those two categories and there are no public safety systems authorized on those channels under consideration to be shared.

2. Channels in the Industrial/Land Transportation and Business categories will be available to fully-loaded SMR systems desiring to expand if no SMRS category frequencies are available. Evidence shall be provided that the SMR applicant has sufficient users to warrant the authorization of the number of requested channels.

3. Channels in the SMRS category will be available to fully-loaded Industrial/Land Transportation and Business category systems desiring to expand if frequencies in their own category are not available. The licensee must demonstrate that it is eligible for additional frequencies and that it has obtained

statements from coordinators in the Industrial/Land Transportation, Business, and Public Safety categories that no frequencies are available in those categories.

4. The out-of-category licensee must operate by the rules applicable to the category to which the frequency is allocated.

* * * * *

Ex Parte Solicitation

Applicant engaged in willful and repeated violations of *ex parte rules*. Its application is dismissed without prejudice to right to refile.

—*Stearns County B/cing Co.*
MM Docket No. 84-1256

FCC 86R-40

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of	
STEARNS COUNTY BROADCASTING COMPANY, INC. Albany, Minnesota	MM Docket No. 84-1256 File No. BPH-840127AC
For Construction Permit for a New FM Station	

Appearances

Gregg P. Skall, *Jack W. Whitley*, and *N. William Jarvis*, on behalf of Stearns County Broadcasting Company, Inc.; and *Jerry M. Hermele* and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 18, 1986; Released June 25, 1986

BY THE REVIEW BOARD: JACOBS, BLUMENTHAL, AND ESBENSEN.

BOARD MEMBER BLUMENTHAL:

1. This proceeding now involves only the basic license qualifications of Stearns County Broadcasting Company, Inc. (Stearns County), an applicant for authority to construct a new FM

broadcast station on Channel 288A at Albany, Minnesota. By *Hearing Designation Order*, FCC 84M-5277, released December 20, 1984, 49 Fed. Reg. 50180 (1984), this application (along with one other application subsequently dismissed) was designated for consolidated hearing on the standard comparative issue (now moot) and on an air hazard issue, which issue the applicant subsequently satisfied, *Memorandum Opinion and Order*, FCC 85M-880, released March 1, 1985. Therein, however, presiding Administrative Law Judge (ALJ) Edward J. Kuhlmann added hearing issues to determine whether Stearns County:

(1) violated the Commission's *ex parte* rules, 47 CFR §§ 1.1223(a), 1.1225(a), and 1.1245[1];

(2) violated 47 CFR § 1.65 by failing to report in this proceeding Commission-approved technical changes (*i.e.*, increased power and direct measurement of antenna power) in the operation of Stearns County's Station KASM-AM, Albany, Minnesota[2];

(3) violated 47 CFR § 73.1250 in its operation of Station KASM-AM[3]

2. In an *Initial Decision* (*I.D.*), FCC 86D-12, released February 26, 1986, the ALJ found against Stearns County on each added issue, concluded that it was unqualified to be a licensee, and denied its instant FM application. This proceeding is now before

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[1] Section 1.1223(a) bars an "interested person" from making "any oral or written ex parte presentation to decisionmaking Commission personnel concerning" restricted proceedings such as comparative hearings. 47 CFR § 1.1223(a). Section 1.1225(a) bars the solicitation or encouragement of others to make such an *ex parte* presentation. 47 CFR § 1.1225(a). Section 1.1245 requires a party "who has substantial reason to believe that an unauthorized *ex parte* presentation has been solicited, attempted or made, or who has information regarding such a presentation [to] promptly advise the [Commission's] Executive Director in writing of all the facts and circumstances concerning that presentation which are known to him." 47 CFR § 1.1245.

[2] Section 1.65 requires that "[w]henever there has been a substantial change as to . . . matter which may be of decisional significance . . . the applicant shall as promptly as possible and in any event within 30 days" amend its application to report the change. 47 CFR § 1.65.

[3] Section 73.1250 delineates when and how an AM station may broadcast emergency information during nighttime hours using full daytime power. It requires that:

> Immediately upon cessation of [such] an emergency . . . a report in letter form shall be forwarded to the [Commission], setting forth the nature of the emergency, the dates and hours of the broadcasting of emergency information, and a brief description of the material carried during the emergency. A certification of compliance with the noncommercialization provision of [47 CFR § 73.1250(f)] must accompany the report . . . together with a detailed showing . . . that no other broadcast service existed or was adequate.

47 CFR § 73.1250(e).

the Review Board on exceptions filed by Stearns County and on the Mass Media Bureau's reply brief which supports a grant to Stearns County. We now have reviewed the *I.D.* in light of the exceptions and reply brief, the oral argument held June 6, 1986, and the underlying record. We find that the matters heard under the issues listed as (2) and (3) above are not disqualifying, separately or jointly. We also adopt the general findings of fact insofar as they reflect that Stearns County did willfully and repeatedly violate the *ex parte* rules. However, because the record lacks the substantial evidence to prove that the culpable principal of Stearns County was sufficiently familiar with the *ex parte* rules, and then knowingly violated those rules, we will reverse the ALJ's conclusion that Stearns County must be disqualified. *See generally Moore County Radio Company*, FCC 86-95, released March 3, 1986 (MM Docket No. 84-1015) ("[t]he solicitation of assistance without an intent to improperly influence a determination on the merits is not disqualifying. . . ."); *Charles R. Lutz*, 56 F.C.C. 2d 385, 386 (1975) ("lack of familiarity with the Commission's rules regarding its hearing proceedings, [weakens] any inference of intent . . . to violate the rules."). Notwithstanding, because the *ex parte* rule violations were serious, willful and repeated, and because Stearns County was found recently to have violated the *ex parte* rules in connection with its prior FM application and expressly warned by the full Commission that "future violations will be met with appropriate administrative action," *Stearns County Broadcasting Co.*, 71 FCC 2d 412, 415 n. 6 (1979), we dismiss its instant FM application to purge any appearance or taint of improper political influence in this adjudicatory case and to effectuate the Commission's direct monition to Stearns County that future *ex parte* rule violations would not be countenanced. Our dismissal is without prejudice to Stearn County's right to refile another application and to properly prosecute that application beyond any shadow of improper political influence.

Ex Parte Violations

3. The *I.D.* reflects that, shortly after Stearns County filed its instant FM application on January 27, 1984, its president, principal and general manager of its Albany, Minnesota KASM-AM, deliberately commenced an illicit campaign to bring external political pressure to bear in favor of a grant of its FM application. Thus, with the foreknowledge of a probable competing application, Barbara Gretsch wrote to at least two U. S. Senators and to her

congressional district's U.S. Representative advising of her pending FM application. Stating that, "[r]ecently, I learned someone else is interested in the channel," Gretsch told those elected representatives that "I would appreciate any help you can give us on this." *I.D.* at para. 3 (reprinting Gretsch Letter of April 20, 1984 to Senator Rudy Boschwitz).

4. On May 18, 1984, Leverrier Broadcasting Company filed a competing application for this Albany FM channel, public notice of which was given on June 1, 1984. Despite, indeed because of, the mutually exclusive Leverrier application and the adjudicatory posture of the FM case, *see* 47 CFR § 1.223(a), Gretsch dispatched three more letters to the two senators and to her congressman pleading the specific merits of her case and asking for their assistance with the FCC.[4] No copies of the letters were

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[4] The three letters are reprinted at para. 4 of the *I.D.* and read as follows:

> Dear Senator Boschwitz:
>
> Thank you for your letter of July 10th, 1984.
>
> I am sending you information about what I consider to be our major problem.
>
> A Broadcasting Company form out East [sic] has also made application for our FM channel, 288A.
>
> I realize we are now going to have to go thru a hearing, but wonder, if you could, on our behalf, help us get that channel. We are locally owned, 50% by women, and a woman manager . . . [sic] Also, we are hoping the FCC will give Daytimers preference, as we feel the FM would help us out when the AM goes off the air. We have had to stay on 2 times this [sic] summer, and went back on the air once, during the stormy weather we've had.
>
> If there is anything you can do, we would greatly appreciate is [sic].
>
> * * *
>
> Dear Arlan (Representative Strangeland]:
>
> I am writing you again hoping you can help us.
>
> The problem is this: Another Broadcasting company from out East has also made application for our FM channel 288A.
>
> I realize we are now going to have to go thur [sic] a hearing, but wonder if you could, on our behalf, help us get that channel. We are locally owned, 50% by women, (six sisters) and a woman manager . . . [sic] Also we are hoping the FCC will give Daytimers preference, as we feel the FM would help us out when the AM goes off the air. We have had to stay 2 times this summer, andwent back on the air once, during the stormy weather we've had.
>
> If there is anything you can do, we would greatly appreciate it.
>
> * * *
>
> Senator Pressler:
>
> I was one of the many Broadcasters attending the Sioux Falls Hearing on Saturday April 14, 1984.
>
> I am writing to you along with the Senators and Representative from my

served on the competing applicant, Leverrier. *I.D.*, paras. 10, 32. Gretsch continued to solicit the assistance of the senators and her representative through many additional written and oral communications. *I.D.*, para. 9. She also communicated with congressional staff, an example of which is this letter to Loanne Thrane of Senator Boschwitz's St. Paul office:

> I am writing in reference to our telephone conversation of this afternoon.
>
> First of all, our application file number is PBH [sic] 840127AC.
>
> ... [The FCC is] trying to tell me that some fellow from Maryland can apply for a license here and take it away from local ownership ... well I don't think he should be allowed to take our business away from us ... SO YOU SEE, I NEED HELP!!!
> We want this FM, so that we can keep our listener informed about weather, news and sports when the AM goes off the air ... ANYTHING YOU CAN DO TO HELP WOULD BE GREATLY APPRECIATED.

I.D., para. 7. Other direct solicitations were pursued, illustrative of which is a letter of August 8, 1984 to Representative Strangeland wherein Gretsch pleads the specific merits of her FM case again, advises that "someone else from MARYLAND filed for it," urges that "IF YOU HAVE ANY CLOUT AT ALL I CERTAINLY CAN USE YOUR HELP," and concludes that "I know we are going to have to go thru a hearing, and I don't feel up to losing it to someone from Maryland . . . ." *I.D.*, at para 8. These letters were followed by oral solicitations, *id.*, para. 9, and by numerous *ex parte* letters from locally prominent individuals to the FCC, all admittedly solicited by Gretsch. *See id.* paras. 11–12.

5. Gretsch's *ex parte* solicitation campaign bore tangible fruit. For example, the office of FCC Chairman Mark S. Fowler received

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district asking for help with the following.

> We are a 1,000 watt daytime station. Reently I filed an application withthe FCC for a FM station (Channel 288A, 105.5 MHz. Application number 840127AC. We really were looking forward to this FM, as it would certainly [sic] help out our daytimer, as this summer we have stayed on the air 2 times and returned to the air once due to the weather. Well, wouldn't you know it . . . some one from out East also filed for this application, and of course we will now have to go to a hearing, and pray to God the FCC gives us the FM, which as far as I'm concerned we rightfully should have in the first place.
>
> KASM–AM is owned 50% by 6 sisters and 50% by three local businessmen and try very hard to run a station that is concerned with all local happenings . . . We do much public service . . . expecially [sic] in the farm line. Our county agent is on every hour with a short informative [sic] message.
>
> I really do need all the help I can get, and if there is something you can do I will greatly appreciate it.

this letter of August 14, 1984 from Senator Boschwitz:

> I am interesed in the situation involving competition for the FM channel in Albany, Minnesota. My constituent, Barb Gretsch, and other owners of KASM have been providing vital information and services to nearby residents via their regular daytime broadcasts and hope to continue serving them after normal daytime hours via FM channel.
>
> Their application BHP840127AC was for a 3,000 watt statio. According to Barb, the only other applicant is Leverrier Broadcasting of the state of Maryland.
>
> In this situation, I would hope that FCC would give preference to a Minnesota broadcaster over an out-of-stater.
>
> Enclosed are copies of Barb's first letter to me (on which my aide made written inquiry to FCC), and Mr. McKinney's response. Also enclosed is Barb's most recent letter to my State Director, Loanne Thrane.
>
> Mark, I urge you to do everything possible to assure KASM's success in acquiring the FM channel there in Albany. I look forward to your prompt attention in this matter.

I.D., at para. 13. *See also id.*, at para. 14 (reprinting an August 14, 1984 letter to the FCC from Representative Strangeland). Many other *ex parte* communications, admittedly solicited by Gretsch, were received by the office of the FCC Chairman and the Commission. *See id.*, paras. 10-12. Gretsch's illicit campaign continued until, at least, October 17, 1984, when she again wrote to Senator Boschwitz and Representative Strangeland urging them to use their offices in her behalf in this adjudicatory proceeding. *See id.*, para. 15.

6. Stearns County does not deny its serious *ex parte* rule violations.[5] Nor does it deny that the violations of law were repeated and willful within the meaning of the Communications Act, for which revocation of its AM license might lie under 47 U.S.C. § 312.[6] Rather, it asserts three general lines of defense:

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[5] *See, e.g.*, Stearns County Exceptions at 6, 7 & n. 2, 25, 26.

[6] Section 312(f)(1) of the Communications Act, as amended (1982), reads:

> The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

In amending the Act as above, Congress was making no new law; it merely intended to codify the Commission's definition of "willful" in *Midwest Radio-Television, Inc.*, 45 FCC 1137 (1963). H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 51 (1982) (Conference Report). Counsel for Stearns County conceded, as it had to, that the subject *ex parte* violations were willful and repeated under Section 312. *See* Tr. of Oral Arg. of June 6, 1986 at 504.

(1) that its president and the solicitor of the illicit *ex parte* contacts, Barbara Gretsch, was absolutely ignorant of the relevant *ex parte* rules as well as the Commission's 1979 warning to Stearns County about future *ex parte* rule violations; (2) that, as a member of the Daytime Broadcasters Association, Gretsch "was being urged to write her Congressmen and Senators on behalf of all daytime only radio stations"[7]; and (3) that the ALJ refused to mitigate the *ex parte* violations on the claim that Gretsch had improved the programming and facilities of KASM-AM.[8]

7. We reject the defenses indicated in numbers (2) and (3) above, and agree with the Media Bureau that neither of these are valid nor mitigating. Stearns County's suggestion that Gretsch's illegal solicitation campaign was a function of her membership of the Daytime Broadcasters Association, or that Gretsch so believed, is plainly belied by the content of her written communications. Although certain of her letters do mention a "Daytimers preference,"[9] they do so only in the context of her own application, and her *ex parte* solicitations clearly focus on the narrow merits of her competing application (*e.g.*, local and female ownership). Further, the Gretsch communications reprinted in the *I.D.* seek the intervention of her correspondents not in behalf of daytime broadcasters in general, but only in behalf of *her* application over "some fellow from Maryland." *See id.*, at paras. 3–8.[10] As to defense number (3), above, we agree with the Media Bureau that Stearns County's exception going to the ALJ's refusal to consider claims of improvements at KASM-AM under Gretsch is without merit.[11] It did not make the threshhold showing requisite to a "past broadcast record" issue[12]; and — even if it had — Stearns County cites no precedent for the proposition that serious misconduct such as willful and repeated violation of fundamental *ex parte* strictures can be offset by such trumpery as "new office furniture."[13]

8. Stearns County's chief defense is Gretsch's purported igno-

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[7] Stearns County Exceptions at 33.

[8] *See id.*, at 26–30.

[9] *See, e.g.*, Gretsch Letter of August 8, 1984 to the Commission, reprinted at *I.D.*, para. 6.

[10] In connection with defense number (2), we agree with the ALJ (*I.D.*, para. 40) and the Media Bureau (Reply Brief at 8) that Stearns County's claim that Gretsch was merely "exercising her constitutional right to petition the government" on behalf of a daytimer preference in comparative proceedings (Exceptions at 46 n. 10) is all but frivolous, both on the facts and the law.

[11] *See* Reply Brief at 7–8.

[12] *See generally Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965); *Gilbert Group, Inc.*, 49 RR 2d 1081, 1082 (1981).

[13] Media Bureau Reply Brief at 8, quoting Stearns County Exceptions at 27.

rance, both of the Commission's *ex parte* prohibitions and of the Commission's 1979 warning to that licensee that future *ex parte* violations would result in "administrative action." *Stearns County, supra*. Although Barbara Gretsch has been a principal of Stearns County since 1975,[14] and has been the president of the licensee since 1983,[15] it is claimed that her gross violations of the *ex parte* rules were "unintentional" in that "Mrs. Gretsch was completely unaware of the Commission's ex parte rules when she wrote to her elected officials and when she solicited local support for her FM application"[16]; that "Stearns County . . . failed to keep current FCC rules at the station and, therefore, Ms. Gretsch could not have consulted the rules it is now being held accountable for"[17]; that while Gretsch consulted with the former general manager of KASM-AM, Urban Keppers, prior to filing the 1984 FM application, Keppers "kept secret" the prior violations and the Commission's 1979 warning[18]; that Keppers never advised Gretsch about the *ex parte* rules in their 1984 discussions[19]; and that Gretsch did not learn about the *ex parte* rules in her conversation with two other daytime licensees, one of whom (Eugene Sudduth) had had *ex parte* issues designated against him in connection with his FM application.[20]

9. We tend to agree with the ALJ that the protestations of a thorough going ignorance of FCC rules — protestations nearly boastful at times[21] — appear to be rather overdrawn. *See, e.g., I.D.*, paras. 35–37 & n. 6. We also concur with the Media Bureau's suggestion that Gretsch may have lacked candor in denying that she learned of the "general wrongfulness" of her *ex parte*

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[14] Stearns County Exceptions at 5.

[15] *Id.*

[16] *Id.*, at 6.

[17] *I.D.*, at para. 37.

[18] Stearns County Exceptions at 9–14. It is asserted that Keppers merely placed the Commission's 1979 order in "the station's file." *Id.*, at 14–16.

[19] *Id.*, at 17.

[20] *Id.*, at 19–25.

[21] *See, e.g.*, Stearns County Exceptions at 10, 11–13, 15–18, 21 (quoting testimony of Stearns County witnesses). Thus, for example, the licensee asserts (*id.*, at 10):

> When asked whether there was any discussion about FCC rules and regulations during a corporate meeting which she may have attended, Ms. Gretsch replied: 'Never, never, never, never.' Tr. at 210.

That, by our calculation, is two steps beyond "Never-Never Land."

Had those associated with the licensee alleged ignorance of FCC rules on a slightly broader scale, an "ineptness" issue would not have been completely unwarranted. *Cf. George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 873–882 (Rev. Bd. 1982) (subsequent history omitted).

Eugene Sudduth, but nonetheless committed the offense again by thereafter writing to her elected representatives.[22] And, we accept the proposition that a licensee once warned of *ex parte* rule violations is deemed to have "constructive knowledge" of those rules. *See I.D.*, para. 38, citing *Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982); Media Bureau Reply at 6 ("The Bureau agrees with [the *I.D.*'s] constructive knowledge conclusion. . . .").

10. Nevertheless, for reasons manifested in the timeless legal precept that "ignorance of the law is no excuse," it is usually impossible to objectively prove that an offender had a perfect knowledge of the law being violated.[23] In this case too, we cannot say that a preponderance of the record evidence supports a confident finding that Gretsch was fully aware of the prescription against the solicitation of *ex parte* communications. On the other hand, while *Moore County Radio Company, Charles R. Lutz, supra* para. 2, and the other cases cited by Stearns County in its defense are instructive,[24] they are not entirely controlling here. All seem subsumed well within the "one bite" doctrine, and none promote a feast on nescience. *Compare Desert Empire Television, supra* (second violation of *ex parte* rules not excused by claims of ignorance). Stearns County has been previously warned, and we are here concerned with a second episode of licensee misconduct that goes to the vital heart of administrative law. Thus, the Administrative Procedure Act provisions relating to agency adjudications contain the same critical prohibitions as the Commission's *ex parte* rules, to wit:

> no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to beinvolved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.

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[22] Media Bureau Reply at 4 states:

> Gretsch called Sudduth on October 16, 1984, and they discussed their respective AM stations, pending FM applications and letter-writing campaigns in support of their FM applications. Sudduth asked for copies of Gretsch's letters and explained to her that they would be used in defense of the allegations of improper ex parte conduct made against him. At this time, Gretsch realized the nature of Sudduth's legal troubles and she became aware of the general principles underlying the Commission's ex parte rules. She also received a warning from Sudduth at this time to be careful in the future about her letters.

[23] But see "*ignorantia eorum quae scire tenetur non excusat*" ("ignorance of those things which one is bound to know excuses not"); *Desert Empire Television, supra.* At some point, a licensee's vice of studied ignorance of FCC rules cannot be counted a virtue. *George E. Cameron, Jr. Communications, supra* note 21.

[24] *See* Stearns County Exceptions at 41–45.

5 U.S.C. § 557 (d)(1)(A) (1976).[25] Consequently, some sharp administrative action must be taken against Stearns County so as to (1) effectuate the full Commission's 1979 warning directly to that licensee and (2) ensure against the perception that Stearns County's illicit campaign to bring external political influence to bear in an adjudicatory licensing case did have, in fact, the *precise* effect desired.[26]

11. In contemplating an appropriate sanction here, we are drawn to the wisdom of several courts in treating situations involving potential and/or improper political influence in adjudicative cases, or the appearance thereof. Thus, in *U.S. v. National Broadcasting Co., et al.* 65 F.R.D. 415 (1974), the U.S. District Court for the Central District of California was faced with allegations that the major 1972 antitrust suit brought against all three national television networks had been predicated wholly on improper political motives. When the Attorney General was unable to comply with discovery orders for relevant presidential documents, the court was confronted with the necessity of purging any potential taint of political influence. Rather than allowing the case to simply go on, Judge Kelleher opined that: "There is a better way." He then dismissed the government's suite "without prejudice" to a refiling in order to purge any possible perception of political taint. Similarly, in *Pillsbury Co. v. FTC*, 354 F. 2d 952 (5th Cir. 1966), the court vacated that administrative agency's adjudicatory decision because of the improper intervention of several U.S. Senators. While accepting that the members of the FTC were "sufficiently aware of the realities of governmental, not to say 'political,' life as to be able to withstand" political pressure, 345 F.2d at 964, the court itself

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[25] As the Commission has observed with respect to the elemental nature of its *ex parte* prohibitions, "[n]o law or regulation is required to establish this principle or to impose sanctions on those who disregard it." *Ex Parte Communications*, 1 FCC 2d 49, 50 (1965).

[26] The Media Bureau recognizes the need for a strong sanction against Stearns County, but offers only that "the Bureau will refer Stearns' conduct to the appropriate branch of the Enforcement Division for consideration of the issuance of a Notice of Apparent Liability for monetary forfeiture." Reply at 8-9. While appreciative of the due process provisions of the monetary forfeiture sections of the Communications Act, 47 U.S.C. §§ 503-504, we see nothing in the statute that would have prevented the Bureau from stating affirmatively that a Notice of Apparent Liability would issue forthwith to the licensee. As it is, a forfeiture may now be precluded by the time limitations set forth in § 503(b)(6). These statutory time limits may be jurisdictional, not just procedural, *see generally N.B.M.C.* v. *FCC*, 760 F.2d 1297 (D.C. Cir. 1985). Hence, Stearns County's oral argument offer to pay any potential monetary forfeiture (*see* Tr. of Oral Arg., *supra*, at 537-538) may be unavailing.

held that it was "not so 'sophisticated' . . . to disregard the force of the intrusion into the adjudicatory process." *Id.* Despite the long pendency of the FTC's *Pillsbury* proceeding, the court expunged the agency's decision, without prejudice to its right to commence the adjudictory process afresh. *Id.*, at 965.

12. Although the above cases arose in different contexts, the common link to our instant case is obvious. That is, all involve the potential or appearance of improper political influence on cases *sub judice*. As the *Pillsbury* court stated:

> we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the *appearance of impartiality*, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

Id., at 964 (emphasis added). *See also Amigos Broadcasting, Inc. v. FCC*, 696 F. 2d 128 (D.C. Cir. 1982). The Board itself has recently employed the remedy of refusing a broadcast application where basic misconduct poisoned an applicant's prosecution of that application. *Margaret J. Hanway*, 59 RR 2d 1296 (Rev. Bd. 1986). There also, in searching for "the proper degree of sanction for the misconduct at issue," the Board did not absolutely disqualify the applicant, but denied its pending application without prejudice to the right to refile for the subject FM channel, and to prosecute that application properly. *Id.*, at 1301-1302.

CONCLUSION

13. In the view of the Media Bureau in this case, "the *I.D.*'s sanction of disqualification was to harsh"[27]; but, at oral argument, Bureau counsel volunteered that a result coinciding with *Hanway* "would be perfectly acceptable to the Mass Media Bureau."[28] Considering all of the foregoing, we will take our cue from the courts and some guidance from *Hanway*. Though we

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[27] Reply at 8. Such a finding might well jeopardize Stearns County's AM license. *See generally RKO General, Inc.* v. *FCC*, 670 F. 2d 215 (D.C. Cir. 1981), *cert denied*, 456 U.S. 927, 1119 (1982).

[28] *See* Tr. of Oral Arg., *supra*, at 535. Throughout its oral argument, the Bureau's consistant theme was that the Board's sanction against Stearns County should be carefully tailored to "fit the crime." We appreciate the Bureau's position, but respectfully remind it that, under *Broadcast Associates of Colorado*, FCC 86-215, released May 9, 1986, para. 4 & n. 5, the Board's ability to proportionately tailor sanctions is now exceedingly limited. Had this case remained in a comparative posture, it appears that the Board's choices would have been to either ignore Stearns County's willful and repeated misconduct or disqualify it outright. The former practice of assessing proportionate comparative demerits seems to be wholly precluded by *Broadcast Associates*.

understand the impact on Stearns County's second (though equally corrupted) bid for an FM station in Albany, Minnesota,[29] the ALJ was apt in noting the Commission's stern warning in *Ex Parte Communications, supra* note 25, that a "[party] who engages in such efforts in a contest before an administrative agency is fortunate if he [sic] loses no more than the matter involved in that proceeding." 1 FCC 2d at 50, quoting *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841. We can merely agree.

14. ACCORDINGLY, IT IS ORDERED That the application of Stearns County Broadcasting Company, Inc. (File No. BPH-840127AC) for a construction permit for a new FM station at Albany, Minnesota IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[29] While our rules contain a 1-year interval filing requirement, *see* 47 CFR § 73.3519, that 1-year requirement may be waived in the agency's discretion. *See Hanway, supra*, 59 RR 2d at 1302. To the extent that the Media Bureau's suggestion of a potential issuance of a Notice of Apparent Liability for forfeiture would have also required a subsequent discretionary action, no difference in sanctions obtains on that account.

FCC 86D-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of STEARNS COUNTY BROADCASTING COMPANY, INC. Albany, Minnesota For Construction Permit for a New FM Station	MM DOCKET NO. 84-1256 File No. BPH-840127AC

Appearances

Gregg P. Skall, Jack W. Whitley, N. William Jarvis on behalf of Stearns County Broadcasting Company, Inc. and *Jerry M. Hermele* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: February 21, 1986; Released: February 26, 1986

1. By *Hearing Designation Order*, 49 Fed. Reg. 50108 (1984), the Chief Audio Services Division, designated the mutually exclusive applications of Stearns County Broadcasting Co., Inc. and Richard R. Leverrier and Leigh Leverrier d/b/a Leverrier Broadcasting Company for a new FM station at Albany, Minnesota for a comparative hearing.[1] By *Memorandum Opinion and Order*, FCC 85M-880, released March 1, 1985, the following issues were added in the above-captioned proceeding:

> 1. To determine with respect to Stearns County Broadcasting whether any of its officers, stockholders or directors violated Sections 1.1223(a), 1.1225(a) and 1.1245 of the Commission rules and, if so, the effect thereof on the applicant's basic and comparative qualifications.
>
> 2. To determine with respect to Stearns County Broadcasting whether it

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[1] Air hazard issues were specified against Stearns and Leverrier. By *Memorandum Opinion and Order*, FCC 85M-880, released March 1, 1985, the Presiding Judge granted Stearns and Leverrier's petitions for summary decision on this issue, resolving both air hazard issues in Stearns and Leverrier's favor.

failed to report a substantial change which may be of decisional significance and in violation of Section 1.65 when it failed to inform the Commission in this proceeding of the technical changes in the operation of station KASM-AM, and, if so, to determine its effect on the applicant's basic and/or comparative qualifications.

3. To determine with respect to Stearns County Broadcasting whether, in the operation of KASM-AM, it has failed to comply with Section 73.1250 and, if so, the effect thereof on the applicant's basic or comparative qualifications.

Pursuant to an April 23, 1985 Joint Request for Approval of Settlement Agreement, the Leverrier application was dismissed for a payment of $50,000 by Stearns to Leverrier. *Memorandum Opinion and Order*, FCC 85M-1868, released April 26, 1985. With Stearns as the only remaining applicant, hearing sessions were held on the foregoing issues on July 15-17, 1985. The hearing record was closed on July 17, 1985. Tr. 496. Proposed findings of fact and conclusions of law were filed by Stearns and the Mass Media Bureau on August 30, 1985 and replies were filed on September 20, 1985.

FINDINGS OF FACT

I. Violations of § 1.1223(a)—Presentations prohibited in restricted adjudicatory proceedings prior to their designation for hearing; § 1.225(a)—Solicitations of ex parte presentations; and § 1.1245—Disclosure of information concerning ex parte presentations.

2. Stearns County Broadcasting Company filed its application for FM Channel 288A at Albany, Minnesota on January 27, 1984. The only competing application was filed by Leverrier Broadcasting Company on May 18, 1984. Public notice of Leverrier's application was given by the Commission on June 1, 1984. MMB Exh. 3 at 2.

3. On April 20, 1984, Barbara Gretsch, on behalf of Stearns County Broadcasting, wrote essentially the same letter to the United States Senators from Minnesota and the United States Representative from her Minnesota district. Ms. Gretsch is an owner, officer and director of Stearns County Broadcasting and she manages KASM-AM, Albany, Minnesota which is licensed to Stearns County Broadcasting. Because the text of all three letters was approximately the same, only the letter to Senator Boschwitz

follows (MMB Exh. 3 at 3):

> As you know KASM has been serving the rural audience of Central Minnesota with a 1000 watt daytime station since 1950.
>
> In January of 1984, we applied for an FM license for a 3000 watt station. There is a channel allocated for the city of Albany, 228A at 105.5. Our file number is PBH [sic] 840127AC.
>
> We feel we need this FM to help out our Daytimer. We have to go off the air early or we can stay on at reduced power which is 45 watts at the present time, soon to be 100 watts, if the FCC does what it says it's going to. This isn't much, but certainly is better than signing off at 4:30 in December when the boys and girls in this area are on school buses. If we do get the FM which we are applying for it will help us keep our listeners up to date on the weather and other vital news. We have always been concerned because we know there are people out there that just do not listen to radio when we go off the air, with the FM we feel they will tune us in when the AM is off for the day.
>
> I would appreciate any help you can give us on this. Recently, I learned someone else is interested in the channel, and I believe the FCC has stated they are going to give daytimers preference.
>
> KASM is owned by 6 sisters, 5 of us live in the Albany area, and one lives 30 miles away, along with 3 local businessmen [sic].

4. On July 13, 1984, Ms. Gretsch wrote three more letters to members of Congress. The text of each is as follows:

> Dear Senator Boschwitz:
>
> Thank you for your letter of July 10th, 1984.
>
> I am sending you information about what I consider to be our major problem.
>
> A Broadcasting Company form out EAst [sic] has also made application for our FM channel, 288A.
>
> I realize we are now going to have to go thru a hearing, but wonder, if you could, on our behalf, help us get that channel. We are locally owned, 50% by women, and a woman manager . . . [sic] Also, we are hoping the FCC will give Daytimers preference, as we feel the FM would help us out when the AM goes off the air. We have had to stay on 2 times ths [sic] summer, and went back on the air once, during the stormy weather we've had.
>
> If there is anything you can do, we would greatly appreciate is [sic]. MMB Exh. 3 at 6.

* * *

> Dear Arlan [Representative Stangeland]:

I am writing you again hoping you can help us.

The problem is this: Another Broadcasting company from out East has also made application for our FM channel 288A.

I realize we are now going to have to go thur [sic] a hearing, but wonder if you could, on our behalf, help us get that channel. We are locally owned, 50% by women, (six sisters) and a woman manager . . . [sic] Also we are hoping the FCC will give Daytimers preference, as we feel the FM would help us out when the AM goes off the air. We have had to stay on 2 times this summer, and went back on the air once, during the stormy weather we've had.

If there is anything you can do, we would greatly appreciate it. MMB Exh. 3 at 7.

* * *

Senator Pressler:

I was one of the many Broadcasters attending the Sioux Falls Hearing on Saturday April 14, 1984.

I am writing to you along with the Senators and Representative from my district asking for help with the following.

We are a 1,000 watt daytime station. Recently I filed an application with the FCC for a FM station (Channel 288A, 105.5 MHz. Application number 840127AC. We really were looking forward to this FM, as it would certianly [sic] help out our daytimer, as this summer we have stayed on the air 2 times and returned to the air once due to the weather. Well, wouldn't you know it . . . some one from out East also filed for this application, and of course we will now have to go to a hearing, and pray to God the FCC gives us the FM, which as far as I'm concerned we rightfully should have in the first place.

KASM-AM is owned 50% by 6 sisters and 50% by three local businessmen and we try very hard to run a station that is concerned with all local happenings . . . We do much public service . . . expecially [sic] in the farm line. Our county agent is on every hour with a short informatitive [sic] message.

I really do need all the help I can get, and if there is something you can do I will greatly appreciate it. MMB Exh. 3 at 8.

5. On July 13, 1984, Ms. Gretsch on behalf of Stearns County Broadcasting wrote the following request to the Mayor of Albany, Minnesota (MMB Exh. 3 at 9):

Dear Mayor Evans:

I'd like to ask a favor of you!!! [sic]

The Stearns County Broadcasting company has filed an application with

> the FCC for an FM station at Albany, and I would appreciate a letter from you on village stationery, written to the FCC requsting [sic] a favorable decision.
>
> The FM station would permit KASM to service our listeners after the AM goes off the air with weather and other vital information, including local sports. You might also include some reasons of your own, as they come to mind.
>
> Would you please send your letter to me and I will forward it to the FCC.
>
> Thanking you in advance.

6. With slight changes in the foregoing letter she sent letters on July 13, 1984 to Duane Hill, Superintendent of Schools and Arthur J. Diedrich, President of the Avon State Bank. MMB Exh. 3 at 11, 12. On July 14, 1984, Ms. Gretsch sent a similar letter to the Shad Funeral Home, Melrose, Minnesota. MMB Exh. 3 at 13. Ms. Gretsch wrote the following letter on August 8, 1984 to the Commission (MMB Exh. 3 at 24):

> I am writing in reference to the Daytimers preference.
>
> We are a daytime station situated in the heart of Stearns County, owned by 6 sisters and 3 local businessmen.
>
> We feel our daytime station should have preference over anyone else as we have struggled for many years trying to compete with other stations in this market. We at one time signed on with 500 watts, and now have only 187 watts early in the morning and this is a farm area, the farmers depend on us for many reports, weather and local happenings. We feel we have served our central Minnesota listening audience well and are hoping to be able to do the same with an FM when the AM goes off the air. I am sure that when you really sit down and plot this thing out you will also agree that daytimers do need a break. I realize you are all in a tough position, but I feel this it [sic] is only fair play to see that the daytime stations of this country have a chance to serve their listening audiences in the evening as well.
>
> KASM went on the air in 1950 and has been long known for its service to their audience. This summer we had to stay on the air twice and did come back on one time due to the weather, if we were to get an FM we would not have this problem and our audience would have local service by local people.

7. On August 8, 1984, Ms. Gretsch wrote to Loanne Thrane in United States Senator Boschwitz's St. Paul office the following

letter, which is excerpted (MMB Exh. 3 at 25):

> I am writing in reference to our telephone conversation of this afternoon.
>
> First of all, our application file number is PBH [sic] 840127AC.
>
> ... [The FCC is] trying to tell me that some fellow from Maryland can apply for a license here and take it away from local ownership ... well I don't think he should be allowed to take our business away from us ... SO YOU SEE, I NEED HELP!!! We want this FM, so that we can keep our listener informed about weather, news and sports when the AM goes off the air.
>
> * * *
>
> ANYTHING YOU CAN DO TO HELP WOULD BE GREATLY APPRECIATED.

8. The following letter was sent to United States Representative Stangeland on August 8, 1984 (MMB Exh. 3 at 26):

> I have written to you before to ask for help in our behalf and am afraid I need your help again. This is the problem. KASM filed an application (PHB [sic] 840127AC) with the FCC for an FM station at Albany, and there is a channel available. Of course, someone else from MARYLAND filed for it also. Now my lawyer says I should sign a statement saying we would give up the AM to get the FM ... well no way will I do that. If anything I think the FCC should give the daytimers preference, because of the struggle many of us have had over the years. We have had to cut back power early morning and until this year have had to go off as early as 4:30 in the winter months. Now we can stay on until 6, at 45 watts. Anyway I'm not complaining about that, what I am upset about is the fact that the fellow from Maryland will be given preference because we own the daytimer in town ... Can you imagine that ... I think its [sic] rotten that they would allow someone from another part of the country, who certainly knows nothing about Stearns County, or even more important about the weather problems we have, to have preference over someone who knows the county and the problems. [sic] of this area as well as the local station does.
>
> ANYWAY ... IF YOU HAVE ANY CLOUT AT ALL I CERTAINLY CAN USE YOUR HELP ....
>
> I know we are going to have to go thru a hearing, and I don't feel up to losing it to someone from Maryland ... When in fact KASM needs this FM.
>
> THANKS FOR ANYTHING YOU CAN DO!!!

9. In addition to written requests for assistance, Ms. Gretsch made oral requests for help in getting the license to her United States Senator and United States Representative. Tr. 296, 297, 298, 301, 305, 325. She explained to them that Leverrier had filed

and she asked them if they could "please help me get the FM." Tr. 296. It was their "influence" she was asking for. Tr. 305.

10. Ms. Gretsch concedes she personally solicited all the letters that were sent to the Commission. Tr. 319, 327, 336, 348. She admits that she actually mailed some of them to the Commission herself. Tr. 327. She hoped the letters would help her get the FM station. Tr. 336. She never sent any of the letters addressed to the Commission to Leverrier Broadcasting. Tr. 339.

11. All of the letters sent to the Commission urged that Stearns County Broadcasting receive a grant. MMB Exh. 3 at 14–23, 27, 28. Mother of Mercy Nursing Home in Albany, Minnesota sent to the Commission's Chairman a letter on July 16, 1984; the letter was signed by Patrick Mitchell, the home's administrator. *Id.* at 14. Mr. Mitchell gave Stearns County Broadcasting's file number in his letter and stated that the home supported giving Stearns County Broadcasting a grant. Arthur J. Diedrich, President of Avon State Bank, wrote to the Commission on July 16, 1984 and on behalf of the bank urged that Stearns County Broadcasting be given the FM "broadcasting rights." *Id.* at 14. Mr. Diedrich in his letter also specifically referred to the file number of Stearns County Broadcasting's application. *Id.*

12. On behalf of the Jaycees, Albany, Minnesota attorney Paul A. Ampe wrote to the Commission's Chairman with reference to Stearns County Broadcasting's application number; he recommended that the Commission grant Stearns County Broadcasting an FM license. *Id.* at 16. The Stearns County Agriculture Extension Agent, Francis J. Januschka, wrote a similar letter to the Chairman of the Commission on July 20, 1984. *Id.* at 17. On July 23, 1984, William C. Burmeister wrote to the Chairman on behalf of Williams Funeral Home; on July 23, 1984, Rt. Rev. John Eidenschink wrote to the Chairman; on July 25, 1984, Joe Fitzgerald, Executive Director of the Minnesota Soil and Water Conservation Districts wrote to the Chairman; on July 16, 1984, Donald Andersen, Superintendent of the Melrose Public Schools wrote to the Commission; on July 17, 1984, Harold B. Kittleson, Mentor for Shriners Hospital wrote to Ms. Gretsch; and Duane Hill, Superintendent of Schools for Albany Area Schools wrote to Ms. Gretsch on July 23, 1984. *Id.* at 18–23. All of the foregoing letters were received by the Commission and urged granting Stearns County Broadcasting the FM license to be awarded in this proceeding. The letters in MMB Exh. 3 at 14, 16, 17, 18, 19, and 20 were received by Mark S. Fowler, Chairman of the

Commission and the record copies bear the date stamp of his office.

13. On August 14, 1984, United States Senator Rudy Boschwitz wrote to the Chairman of the Commission as follows (MMB Exh. 3 at 27):

> I am interested in the situation involving competition for the FM channel in Albany, Minnesota. My constituent, Barb Gretsch, and other owners of KASM have been providing vital information and services to nearby residents via their regular daytime broadcasts and hope to continue serving them after normal daytime hours via FM channel.
>
> Their application BHP840127AC was for a 3,000 watt station. According to Barb, the only other applicant is Leverrier Broadcasting of the state of Maryland.
>
> In this situation, I would hope that FCC would give preference to a Minnesota broadcaster over an out-of-stater.
>
> Enclosed are copies of Barb's first letter to me (on which my aide made written inquiry to FCC), and Mr. McKinney's response. Also enclosed is Barb's most recent letter to my State Director, Loanne Thrane.
>
> Mark, I urge you to do everything possible to assure KASM's success in acquiring the FM channel there in Albany. I look forward to your prompt attention in this matter.

The date stamped on the letter shows that it was received in the Commission Chairman's office on August 21, 1984.

14. On August 16, 1984, United States Representative Arlan Stangeland wrote to the Commission the following letter (MMB Exh. 3 at 28):

> Please find enclosed a copy of a letter I received from Barbara Gretsch, a constituent of mine regarding an application submitted by the Stearns County Broadcasting Company for the FM channel, 288A.
>
> I would appreciate it if you would advise me of the status of this application. I would also hope that Miss Gretsch's organization receives the utmost consideration for their application.
>
> Thank you for your attention to this matter. I look forward to hearing from you.

15. On October 17, 1984, Ms. Gretsch wrote to Senator Boschwitz and Representative Stangeland again and urged them to use their influence with the FCC to insure preferential treatment to licensees of daytime only station operators like Stearns County Broadcasting. MMB Exh. 7. On Stearns County Broadcasting's behalf, Ms. Gretsch pointed out the importance

such a preference would have on her company's success in this hearing. *Id.*

16. Stearns County Broadcasting's ex parte communications in this proceeding were not the first time it sought to undermine the Commission's processes. On March 30, 1979, the Commission denied an earlier FM application filed by Stearns County Broadcasting. *Stearns County Broadcasting Co.*, 71 F.C.C. 412 (1979)[2] In that proceeding, Isanti Broadcasting Company requested a hearing to explore alleged violations of the Commission's ex parte rules by Stearns County Broadcasting. The Commission held that no action was warranted at that time but the Commission cautioned Stearns County Broadcasting that future violations would be met with appropriate administrative action. 71 F.C.C. 2d at 415 n. 6.

17. The Commission's warning occurred because Urban J. Keppers, who at the time was the station manager, secretary/treasurer, and 25% owner of Stearns County Broadcasting, wrote ex parte pleadings to the Commission on behalf of Stearns County Broadcasting after the proceeding was restricted. MMB Exh. 2 at 24, 25. In addition, Stearns County Broadcasting asked Senator Muriel Humphrey to make a presentation on its behalf. *Id.* at 26. Mr. Keppers also wrote to Representative Richard Nolan on August 5, 1978, and Senator Wendell Anderson on August 26, 1978 and requested their assistance. MMB Exh. 2 at 2, 4–6. Moreover, after Stearns County Broadcasting was notified in a Petition for Reconsideration or Rescission, filed September 12, 1978 by Isanti Broadcasting Company, that its actions violated the ex parte rules, Mr. Keppers, on January 11, 1979, wrote Senator David Durenberger and asked him to make a presentation to the Commission on Stearns County Broadcasting's behalf. Tr. 83; MMB Exh. 2 at 36. Mr. Keppers, who had been KASM's station manager since the station went on the air in 1950, retired in December 1982 and beginning in January 1983, Ms. Gretsch became KASM's manager. Tr. 202; MMB Exh. 1 at 16.

18. Barbara Gretsch, who undertook the current ex parte communications, purchased her interest in Stearns County Broadcasting in 1975 from her father, W. H. Blattner. MMB Exh. 1 at

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[2] Stearns County Broadcasting's first application for an FM was filed on July 8, 1976 but it was dismissed as unacceptable for filing. Stearns County Broadcasting resubmitted the application on January 14, 1977. Public Notice Mimeo 77132, released January 21, 1977. The 1976–79 litigation was preceded by a rulemaking proceeding in 1974. *FM Table of Assignments, Albany, Minnesota, et al.*, 47 F.C.C. 2d 203, 205 (1974).

16, 22. On June 4, 1982, she purchased a greater interest from her brother-in-law, Louis Gretsch. MMB Exh. 1 at 16. By 1982, Ms. Gretsch, along with her sisters (Cynthia Prill, Margaret Lehner, Mary Thelen, Catherine Falcon, and Aletha Tomlyanovich), owned 50% of Stearns County Broadcasting. *Id.* At that time she began working at KASM-AM. Tr. 202. From 1975, but before she became the manager, she or one of her sisters attended all board meetings. Tr. 152, 203–04. Barbara Gretsch maintains that Mr. Keppers never told her about the Commission's 1979 warning about the ex parte rules. Mr. Keppers also stated that he did not directly tell her about the Commission's order; but he maintains that the order from the Commission was put in the station's file on FM applications and was thereby made available to her. Tr. 82–86. On the other hand, Andrew Glatzmaier, who at the time owned 25% of Stearns County Broadcasting, remembers Mr. Keppers discussing the Commission's order with him (Tr. 123, 124); he cannot, however, remember exactly what Mr. Keppers said. *Id.* Mr. Keppers and Mr. Glatzmaier are close personal friends. Tr. 127. Mr. Glatzmaier is employed by Ms. Gretsch's father in his construction business.

19. Cynthia Prill, who is Barbara Gretsch's sister and who attended board meetings as an owner, explained that Mr. Keppers spent little time at the station and did not perform his manager's job. Tr. 142.

20. Barbara Gretsch found the station in some disarray when she took over as manager. Tr. 94, 192, 282. She did not find the file on the FM proposal until she looked for it in January 1985. Tr. 283. Ms. Prill had advised Ms. Gretsch in 1983 to go through the files and organize them but she did not. Tr. 162, 165, 281. The station apparently had no complete or current copy of the Commission's rules. Tr. 236–237, 373.[3] Ms. Gretsch states that a few months before the hearing she ordered a new set of the Commission rules. Tr. 237. In any event, the Commission's rules were not consulted about the filing of Stearns County Broadcasting's FM application. However, she did ask Mr. Keppers to review Stearns County Broadcasting's 1984 application before it was filed. Tr. 288. Ms. Gretsch claims Mr. Keppers did not mention the Commission's order involving the ex parte

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[3] In disagreement with that statement, Mr. Keppers testified that KASM had a copy of the FCC rules which was periodically updated and a copy of a NAB handbook. Tr. 73, 75, 76. When Mr. Keppers sent his ex parte letters in 1978–79 he did not consult the rules or the handbook. Tr. 74, 76.

communications when he reviewed the application. *Id.*

21. Barbara Gretsch also testified that she did not have legal representation until August 1984. Tr. 321. While she had no formal representation until August, it was the counsel she eventually hired who called her shortly after the May 18, 1984 cutoff date to inform her about Leverrier's competing application. Tr. 311. She also spoke with him at other times. Tr. 321-22. At the hearing, when Ms. Gretsch was urged to be more exact about the conversations, she said she did not know when they took place. Tr. 322.

22. From April to October 1984, Ms. Gretsch consulted with James Wychor about the letters she was writing. Mr. Wychor is the manager of KWOA-AM and FM, Worthington, Minnesota and the President of the Daytime Broadcasters Association. Tr. 435-36. The DBA has sought legislation and a change in the Commission rules to permit AM stations licensed for daytime only operation to extend their hours and to give daytime only operators a preference in licensing proceedings for FM stations. Tr. 301-02, 437, 468. Mr. Wychor was aware of the principles embodied in the ex parte rules. Tr. 452-53. Before Ms. Gretsch wrote her first letters she consulted with Mr. Wychor. Tr. 304. On May 15, 1984, after writing the April 20, 1984 letters, Ms. Gretsch spoke with Mr. Wychor and told him about the letters which she had written soliciting help with her FM application. She told him that she thought someone else would file for the same facility. Tr. 314-16, 457-58, 459. They both claim that the prohibition against ex parte presentations did not come up in their conversation. Tr. 317, 318, 460.

23. Concurrent with his conversation with Ms. Gretsch, Mr. Wychor spoke with Eugene T. Sudduth of Paris, Texas. On July 13, 1984, it was claimed in a petition to enlarge by an applicant competing with Mr. Sudduth for an FM in Paris, Texas that Mr. Sudduth had engaged in ex parte contacts. Mr. Sudduth is already the licensee of KPRE-AM, Paris, Texas. MMB Exh. 9 at 1. Those allegations arose because Mr. Sudduth wrote to the Commission's Chairman and argued the merits of his application without knowledge of the other applicants; he also asserted to the Chairman that the competing applicant had entered the proceeding to receive a payoff. *Id.* at 1, and Attachment A to Exh. 9. In addition, Mr. Sudduth asked U. S. Representative Sam B. Hall, Jr. for his help. *Id.* Mr. Sudduth's lawyer told him about the ex parte allegations on July 16, 1984 at 2:47 p.m. (CT) (*Id.* at 2; MMB Exh. 6 at 2) and at 3:11 p.m. (C.T.) Mr. Sudduth called Mr.

Wychor to tell him about the petition. MMB Exh. 9 at 2; MMB Exh. 6 at 2.

24. On July 20, 1984, Ms. Gretsch called Mr. Wychor and told him about the letters she had sent to the Congressmen on July 13, 1984. Tr. 329, 476. She wrote her letters because she believed that the competing applicant had entered this proceeding to receive a payoff. Tr. 218, 219. Neither Mr. Wychor nor Ms. Gretsch could remember whether they discussed the petition raising ex parte issues about Mr. Sudduth's letter writing efforts. Tr. 330, 475.

25. On August 8, 1984, Mr. Wychor and Ms. Gretsch spoke for 20 minutes. Immediately afterward Ms. Gretsch called Senator Boschwitz's St. Paul office and talked with Loanne Thrane who heads that office. She then wrote the Senator a letter asking for his assistance. MMB Exh. 8 at 2; MMB Exh. 3 at 25. At the same time, she wrote letters to the Commission and U.S. Representative Stangeland. MMB Exh. 3 at 24, 26. Both Mr. Wychor and Ms. Gretsch claim they did not talk about the ex parte rules or issues raised about the letters written by Mr. Sudduth. Tr. 333, 481. Ex parte issues were added against Mr. Sudduth on August 8, 1984 and while Ms. Gretsch and Mr. Wychor talked to each other once on August 14 and September 5, twice on September 24, once on October 10, 15, and 16, 1984, they could not recall having discussed the ex parte rules. MMB Exh. 8. On October 16, 1984, Ms. Gretsch herself called Mr. Sudduth. MMB Exh. 8 at 2. They discussed their respective cases and in a later call Mr. Sudduth asked Ms. Gretsch to send him copies of her ex parte letters. Mr. Sudduth then told her about his problems. MMB Exh. 9 at 2–3; Tr. 344–45. Mr. Sudduth believes he may have told Ms. Gretsch on October 16, 1984 to be careful about letter writing. MMB Exh. 9 at 4.

II. Failure to report in this proceeding the Commission's grant of increased power and permission for direct measurement of antenna power for KASM-AM, Albany, Minnesota which is operated by Stearns County Broadcasting Company.

26. On March 12, 1984, Stearns County Broadcasting filed an application to increase the power of KASM-AM from 1 kilowatt to 2.5 kilowatts. MMB Exh. 4 at 6–17. Brian Benjamin Evans performed the engineering work in connection with that application. Tr. 52. Mr. Evans was unaware of Stearns' 1983 application for direct measurement of antenna power. Tr. 53–54. A construction permit authorizing the power increase for KASM-AM was

granted on September 4, 1984. MMB Exh. 4 at 18. In a Public Notice issued on September 21, 1984, the Commission granted Stearns' application for direct measurement of antenna power. *Id.* at 19-20. Mr. Evans was aware of the power increase grant but not the direct measurement of antenna power grant. Tr. 57-58. Stearns did not report in this proceeding either of the two events concerning its AM station because both Ms. Gretsch and Cynthia Prill were unaware of § 1.65 of the Commission's rules. Tr. 192, 365. Mr. Evans was also unaware of § 1.65 during 1984. Tr. 60-61. Therefore, believing that the AM power increase application and subsequent grant were not directly related to the pending FM application, Mr. Evans did not consider reporting the AM power increase in the FM proceeding and, consequently, gave Ms. Gretsch no advice in this regard. Tr. 52, 62, 64.

III. Stearns County Broadcasting's compliance with § 73.1250.

27. Station KASM-AM was licensed to operate only during daytime hours. MMB Exh. 5 at 1-3. KASM-AM operated post-sunset on the following dates: August 29, 1983, April 26, 1984 and June 5-6, 1984. *Id.* at 4-8; Tr. 193, 235, 369. The August 30, 1983, April 26, 1984, and June 5-6, 1984 operations consisted of only weather-related programming and no commercial material. Tr. 368; MMB Exh. 5 at 10. Ms. Gretsch notified the FCC within 24 hours of KASM-AM's extended operation on all three occasions. Tr. 369. She did not report to the FCC all of the information required by § 73.1250(e) of the Rules because she received no advice regarding this requirement. Tr. 369-70. Specifically, the August 30, 1983 notification to the FCC failed to address the following aspects of § 73.1250(e): (a) whether nighttime service to the community was inadequate; (b) a description of the material aired, and (c) whether any commercial material was aired. MMB Exh. 5 at 6. The April 27, 1984 and June 6, 1984 notifications also failed to address these same three matters. *Id.* at 7-8.

CONCLUSIONS OF LAW

28. The Commission in promulgating rules which prohibit ex parte presentations in restricted proceedings explained that every person has a right to a decision based on the merits of his or her case. In order to protect that right, decisions are based on a record which is compiled openly in accordance with evidentiary and procedural safeguards. *Rules Governing Ex Parte Communications*, 1 F.C.C. 2d 49, 49-50 (1965). While the Commission has

issued specific rules regulating ex parte contacts, "[no] law or regulation is required to establish this principle or to impose sanctions upon those who disregard it." 1 F.C.C. 2d at 50. The Commission long ago alerted parties in Commission proceedings that a "[party] who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding." 1 F.C.C. 2d at 50.[4]

29. Section 1.1223 prohibits any interested person from directly or indirectly making or attempting to make a presentation to decisionmaking personnel after public notice of the filing of a mutually exclusive application or before public notice if the interested person knew that the application had been filed. Section 1.1225 forbids "solicit[ing] or encourag[ing] others to make any presentation which [the applicant is] prohibited from making . . . ." Parties in Commission proceedings are, moreover, required to promptly notify the Executive Director of the Commission in writing of all facts and circumstances concerning ex parte presentations which are known to it. 47 C.F.R § 1.1245 (1985).

30. The record establishes that Stearns County Broadcasting, before designation of this case for hearing but after notice and knowledge of a competing application, violated §§ 1.1223, 1.1225, and 1.1245. Barbara Gretsch, who is President, director, and owns 8.33% of Stearns County Broadcasting, was the official who acted on behalf of the applicant in pursuing its application for FM Channel 288A at Albany, Minnesota. Ms. Gretsch is also the general manager of KASM-AM which Stearns County Broadcasting currently operates at Albany, Minnesota.

31. Public notice was given on June 1, 1984 of the filing of a competing application by Leverrier Broadcasting Company. Before the public notice, but when she realized there probably would be a competing application, Ms. Gretsch wrote to the United States Senators from Minnesota and the member of the United States House of Representatives from her Minnesota district and asked for their help in getting the FM because "someone else is interested in this channel."[5] While these letters were written before Leverrier's application was filed, after Leverrier filed and public notice had been given Minnesota Senator Rudy Boschwitz

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[4] The exparte rules encompass the statutory prohibition set forth in § 409(c) of the Communications Act.

[5] Ms. Gretsch heard, in April 1974, from an Albany real estate agent that an application would be filed that would compete with Stearns County Broadcasting's already filed application for FM Channel 288A.

sent his copy to the Commission. On July 13, 1984, after the Public Notice, Stearns County Broadcasting again tried to enlist the assistance of members of Congress. Barbara Gretsch, who wrote the letters on behalf of Stearns County Broadcasting, characterized the competing applicant in a letter to Senator Boschwitz as a "major problem," she pointed out to him that Stearns County Broadcasting would now have to "go thru a hearing," and she urged him to "help [Stearns County Broadcasting] get that channel." She employed the same language in letters to U.S. Representative Arlan Stangeland and Senator Larry Pressler. Ms. Gretsch also spoke with her Senators and Representative about them using their "influence" to help Stearns County Broadcasting receive a grant in this proceeding.

32. Beginning in mid-July and continuing during August 1984, Ms. Gretsch, also on Stearns County Broadcasting's behalf, solicited letters from community members and organizations. Typically, she wrote to a community leader requesting that they write to the FCC and ask the Commission to grant Stearns County Broadcasting's FM application. She even suggested to them what reasons they should give to the Commission for making a grant and in some cases she requested that the community leader send his letter to her in order that she could forward it to the Commission. Some were sent, at her request, directly to the Chairman of the Commission. The record contains 11 letters from Albany area organizations and individuals which urge that Stearns County Broadcasting receive a grant. None of them were sent to the competing applicant and, while Ms. Gretsch was aware that the letters were sent to the Commission, she did not notify the Executive Director.

33. In addition, in August 1984, Ms. Gretsch herself wrote to the Commission and urged that Stearns County Broadcasting receive a license for the FM facility. She did not send her letter to the competing applicant. On August 14, 1984, Senator Rudy Boschwitz wrote a letter to the Commission's Chairman in which he "urg[ed] him to do everything possible to assure KASM's success in acquiring the FM channel there in Albany." Senator Boschwitz enclosed a letter Ms. Gretsch had sent to him which explained why her application should be granted and made reference to an earlier letter of Ms. Gretsch's that he had already sent to the Commission. U.S. Representative Arlan Stangeland also wrote to the Commission in August and urged that Stearns County Broadcasting's application for Channel 288A receive "the utmost consideration." Like the letters from community members,

the August letters from Ms. Gretsch and the members of Congress were not sent to the competing applicant.

34. On October 17, 1984, Ms. Gretsch again wrote to Senator Boschwitz and U.S. Representative Stangeland and urged them to use their "influence" to help Stearns County Broadcasting to receive an FM grant. There is no evidence that Stearns County Broadcasting ever explained to the persons whose help it solicited the need to inform the competing applicant Leverrier Broadcasting Company. The record reflects that Stearns County Broadcasting for seven months repeatedly urged others to write to the Chairman of the Commission to ask that Stearns County Broadcasting's FM application be granted.

35. The only issue presented is whether Stearns County Broadcasting should be disqualified for its ex parte actions. Stearns County Broadcasting has tried to demonstrate that none of its current or former owners who were responsible for the ex parte contacts knew about the ex parte rules. That argument is without merit; a licensee and applicant is charged with having knowledge of the rules whether or not it has actual knowledge. *Desert Empire Television*, 88 F.C.C. 2d 1413, 1417 (1982). Even putting that responsibility to the side, in this case the record indicates that Stearns County Broadcasting had actual notice of the ex parte rules in 1979 when it was alleged that it violated the rules in another FM application proceeding.

36. In 1978, Stearns County Broadcasting engaged in ex parte efforts to receive an FM grant for a proposal that was short spaced and it was warned then by the Commission that similar conduct would have severe consequences. The Commission's order was received by Stearns County Broadcasting and no action was taken by it to insure that the same problem would not arise again. In addition, there were ample opportunities for Barbara Gretsch to have obtained advice about the ex parte restrictions. She spoke with experienced communications counsel as early as May 1984 about the competing applicant. She regularly spoke with James Wychor, a longtime broadcaster, about the letters she was writing. Mr. Wychor testified that he knew about the prohibition against ex parte contacts. And, she had available the Commission's decision in apparently the station's only file dealing with Stearns County Broadcasting's two previous FM proposals. She made no attempt to review that file until a petition to enlarge alleged that Stearns County Broadcasting had again engaged in ex parte presentations.

37. Finally Stearns County Broadcasting argues that it failed to keep current FCC rules at the station and, therefore, Ms. Gretsch could not have consulted the rules it is now being held accountable for. There is record testimony from Urban Keppers, who retired from his position as station manager in December 1982, that the rules were current and kept at the station. In any event, Stearns County Broadcasting's claim is without any meaning, since Ms. Gretsch has never claimed that she attempted to or that she(?) would have checked the Commission rules. Her consistent argument has been that she never asked anyone or consulted any written references about the legality of what she was doing.[6]

38. In *Desert Empire Television*, 88 F.C.C. 2d 1413, 1417, the Commission disposed of Stearns County Broadcasting's argument by holding that the applicants "claimed lack of knowledge of the rules will not excuse their violations. ... [T]he fact that the licensee repeated the violation after warning and after having been informed specifically concerning the *ex parte* rules reveals a willful disregard of the Commission's processes as well. ... " There is no evidence to support the apparent claims by Stearns County Broadcasting that its repeated ex parte presentations were inadvertent, were made in good faith, or exhibited overall innocent intentions. *Voice of Reason, Inc.*, 37 F.C.C. 2d 686, 709 (1972). The letters sent to Congressmen, community members, and the Commission by the applicant were explicit in their repeated requests that influence be brought to bear on the choice to be made in this proceeding.

39. Stearns County Broadcasting argues that its real purpose in soliciting others to write the Commission and in writing itself

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[6] Barbara Gretsch's testimony is not entirely creditable on this account. She consulted with Mr. Keppers before she filed the application and he concedes he was aware of the Commission's warning. Furthermore, she regularly spoke about the content of her ex parte letters with James Wychor. Mr. Wychor at the same time was talking with Eugene T. Sudduth about the ex parte issues that had been raised about Mr. Sudduth's letters in another pending FM proceeding. While Mr. Wychor and Ms. Gretsch claim that they never discussed Mr. Sudduth's violations of the ex parte rules, they admit they discussed Mr. Sudduth's application after the ex parte issue had been raised. In fact, Ms. Gretsch spoke with Mr. Sudduth and provided him with copies of her letters for his lawyer to review. All in all, it seems highly improbable that Ms. Gretsch did not have the ex parte prohibitions called to her attention long before she stopped soliciting ex parte help for Stearns County Broadcasting's FM application. Ms. Gretsch exhibited selective recollection about most conversations on which she was examined. For example, she specifically remembered that Mr. Wychor never told her about the ex parte prohibitions but she did not remember what they talked about.

was to influence the Commission to enact a policy that would favor existing daytime only AM licensees in FM proceedings. But the letters sent belie that limited goal.[7] They all specifically refer to Stearns County Broadcasting's application in this proceeding and even include the application file number. The ex parte presentations all urge a grant of Stearns County Broadcasting's pending FM application over that of the competitor. While Stearns County Broadcasting is entitled to pursue other legitimate interests before the Commission, it cannot use the pendancy of other matters as a pretext for ex parte communications in a restricted proceeding. *Rules Governing Ex Parte Communications*, 1 F.C.C. 2d 49, 50, 62, *citing WHDH, Inc.*, 29 F.C.C. 294 (1960).

40. Stearns County Broadcasting also argues that the ex parte rules restrict its right to be heard and that the ex parte restrictions, therefore, violate its right of free speech. The Mass Media Bureau has responded that the ex parte rules do not prohibit an applicant from being heard, they only say that presentations cannot be made in secret either directly or indirectly when the issue involves other parties. While the Bureau's view alone is an adequate answer to Stearns County Broadcasting's argument, it cannot be maintained that Stearns County Broadcasting has an unfettered right to be heard when it violates the standard of basic fairness which inheres in the Constitutional right of due process.

41. In urging others to make ex parte presentations on its behalf, Stearns County Broadcasting point out that on at least three occasions it had operated KASM-AM beyond its permitted daytime operating hours. Section 73.1250 permits operation in emergencies to provide information which furthers the safety of life. The programming carried after hours by KASM was weather related but the reports filed by Stearns County Broadcasting with the Commission neglected to justify the broadcasts and generally

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[7] In response to the petition to enlarge, Ms. Gretsch's affidavit explaining her actions made no mention that her purpose was only to change communications policy. Moreover, her letters soliciting ex parte presentations undermine that claim. Ms. Gretsch's August 8, 1984 letter to Representative Stangeland concedes, after describing the plight of AM daytime operators, that that was her principal complaint. She explained, "[W]hat I am upset about is the fact that the fellow from Maryland will be given a preference" and she expressed her view that it is "rotten that [the FCC] would allow someone from another part of the country . . . to have preference . . . ." Ms. Gretsch's reference to a preference for the other applicant apparently a reflection of her understanding that the competing applicant would prevail because Stearns County Broadcasting already operates the only station currently licensed to Albany, Minnesota.

Stearns County Broadcasting failed to provide the Commission with information about the broadcasts which is required by the rule. Ms. Gretsch, who was the station manager when the broadcasts were made in 1983 and 1984, did not consult the rules but instead relied on former manager, Urban Keppers, who she claims told her, "If you stay on [the air] later, all you have to do is write to the FCC." Tr. 370. She concluded at the hearing that "all these years, I was taking poor information." *Id.*

42. After filing its application in this proceeding, Stearns County Broadcasting was granted an increase in power from 1 kilowatt to 2.5 kilowatts for KASM-AM. It made no mention of that fact in this proceeding, although it might have had comparative significance in assessing the diversification demerit that would attach to Stearns County Broadcasting's operation of KASM-AM. Stearns County Broadcasting claims that it was unaware of § 1.65 of the rules. Both its violation of § 73.1250 and its violation of § 1.65 resulted from its indifference to the Commission's regulations and its unwillingness to comply with routine regulatory requirements. While standing alone, these violations do not warrant disqualification; they do demonstrate that Stearns County Broadcasting holds to the view that whatever it determines is necessary to meet regulatory requirements is adequate. Given Stearns County Broadcasting's record, it amounts to willful avoidance of Commission regulations. At this time and on this record, it cannot be concluded that Stearns County Broadcasting is qualified to become the operator of FM Channel 288A in Albany, Minnesota. Its application will be denied.[8]

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[8] The Mass Media Bureau has suggested that instead of denying a grant to Stearns County Broadcasting, the Bureau should be allowed to consider whether a forfeiture should be assessed. Section 1.1251 provides that generally disqualification is the appropriate remedy. That sanction appears to reflect the opinion of the court in the decision which precipitated the rules that an applicant is fortunate if he loses no more than the matter involved. *See WKAT, Inc. v. FCC*, 296 F. 2d 375, 383 (D.C. Cir. 1961) Stearns County Broadcasting, as provided in § 1.1251(b), was given an opportunity to show why its application should not have been denied. As just concluded, it failed in that showing. In most cases the applicant faced with allegations of ex parte behavior dismisses its application or it is dismissed for other reasons, which is what happened the first time Stearns County Broadcasting engaged in ex parte presentations. In other cases, the ex parte acts arise where the licensee is not seeking a grant but is instead answering charges in a forfeiture proceeding. When that occurs a fine is the appropriate remedy. *See Desert Empire Television Corp.*, 88 F.C.C. 2d 1413 (1982).

ACCORDINGLY, IT IS ORDERED that the application of Stearns County Broadcasting Company, Inc. (File No. BPH-840127AC) for a construction permit for a new FM station IS DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN, *Administrative Law Judge*

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[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

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